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In The Supreme Court of the United States

October Term 1998

KENTUCKY RIGHT TO LIFE, INC., et al.,
Petitioners,

v.

DAVID STENGEL, as Commonwealth Attorney for Jefferson County, Kentucky, and as a representative of the class of Commonwealth Attorneys in the State of Kentucky, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS DEALT WITH HEREIN

1. Where a plaintiff alleges an intention to engage in First Amendment activity, which a challenged non-moribund statute arguably proscribes and whose enforcement has not been previously disavowed, is the existence of the statute sufficient to cause an Article III injury for the purpose of determining if the plaintiff benefited by legislative amendments that mooted the constitutional challenge?

2. Where a plaintiff alleges an intention to engage in First Amendment activity, which a challenged non-moribund statute arguably proscribes and whose enforcement has not been previously disavowed, is a credible threat of prosecution presumed absent compelling contrary evidence?

   A. Is a plaintiff's litigation position--that a defendant's voluntary cessation of challenged conduct (i.e., repeal of/ amendments to challenged statutes) does not deprive the federal court of jurisdiction to determine the constitutionality of the challenged statutes--compelling contrary evidence of a presumed credible threat of prosecution?

   B. Is the rejection of an administrative agency's offer to provide an *ultra vires* advisory opinion concerning the reach of challenged statutes compelling contrary evidence of a presumed credible threat of prosecution?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kentucky Right To Life, Inc., Kentucky Right To Life Political Action Committee, Robert Zoeller and Lora Robertson, request a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The unreported order of the court of appeals affirming the judgment of the district court denying petitioners an award of attorneys' fees is reproduced in the Appendix ("App.") filed herewith at App. 1. The opinion of the court of appeals affirming the district court's denial in part of Petitioners' Motion for Preliminary Injunction is reported at 108 F.3d 637 (6th Cir. 1997) and is reproduced at App. 9.

STATEMENT OF JURISDICTION

The court of appeals filed its decision affirming the district court's denial of attorneys' fees on January 8, 1999. App. 1 Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the First and Fourteenth Amendments to the United States Constitution, this case involves the Civil Rights Attorney's Fees Act of 1976 as set forth in Title 42 U.S.C. § 1988, which provides in relevant part:

> In any action or proceeding to enforce a provision of section . . . 1983 . . ., the court, in

> its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This petition concerns the denial of attorneys' fees under 42 U.S.C. § 1988. The court of appeals held that, even though plaintiffs-petitioners' suit appeared to be the direct cause of legislative amendments mooting their constitutional challenge, petitioners did not benefit from the amendments because there was never a credible threat of prosecution. The court reached this conclusion because the (1) State had never enforced the challenged statutes against petitioners and had taken the litigation position that it did not intend to enforce the statutes as the plain terms allowed; and (2) because of petitioners' (a) litigation position that the court retained appellate jurisdiction (after the amendments had been adopted) to decided the constitutionality of the former statutes; and (b) litigation strategy not to accept the State's offer to issue an *ultra vires* advisory opinion, if so requested, limiting the reach of the challenged statutes.

This decision, along with a recent Eleventh Circuit opinion, are departures from the established rule of this Court and several circuits, which hold that where a plaintiff alleges an intent to engage in First Amendment activity, which is proscribed by statute and there is a credible threat of prosecution, such plaintiff has Article III standing. In such cases, the existence of the statute is the source of the injury and a credible threat of prosecution is to be presumed absent compelling contrary evidence.

A. Facts

Petitioner Kentucky Right To Life, Inc. ("KRL") is a non-profit membership corporation, incorporated in Kentucky, with local chapters throughout the State. Its

purposes are to educate the public on issues relating to abortion, to restore protection of the right to life for unborn children, and to promote the sanctity of all innocent human life. KRL intended to engage in issue advocacy regarding candidates and make independent expenditures during the 1995 elections but was deterred because of the statutes at issue.

KRL has established a separate, internal PAC, Petitioner Kentucky Right To Life Political Action Committee ("KRLPAC"). KRLPAC intended to make political contributions to state candidates for statewide and legislative offices, to make independent expenditures for and against such candidates, and to engage in issue advocacy, during the 1995 elections but was deterred because of the statutes at issue.

Petitioner Lora Robertson is the Treasurer of KRLPAC. Petitioner Robert Zoeller is a resident of the State of Kentucky who had intended to contribute to KRL and KRLPAC during the 1995 election but for the statutes at issue.

B. Proceedings Below

On August 22, 1995, petitioners filed a Verified Complaint for declaratory and injunctive relief challenging several of Kentucky's election laws.[1] Petitioners also

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[1] Petitioners challenged the following statutes:

(1) Ky. Rev. Stat. Ann. § 121.025 (App. 58), alleging that its prohibition on corporate contributions prohibited KRL, a "[v]oluntary political association" that "do[es] not pose th[e] danger of corruption," from making direct contributions to candidates (*see FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259, 263 (1986) ("*MCFL*") and *North Carolina Right To Life, Inc. v. Bartlett*, 1999 WL 74739 , at *7-9 (4th Cir. Feb. 17, 1999)), and that this prohibition, coupled with the definition of "contribution" in §§ 121.015(6)(e) ("any [e]xpenditure in connection with any other activity undertaken . . . made

challenged § 121.150(10)'s $1,500 aggregate contribution limit to "permanent committee" and § 121A.030(4)'s 25 percent aggregate limit on "permanent committee"

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or furnished for the purpose of influencing the results of an election") and 121A.010(11)(a)(5) (same), respectively (App. 57, 95), prohibited KRL from making both constitutionally protected independent and issue advocacy expenditures (*see MCFL*, 479 U.S. at 263 and *Buckley v. Valeo*, 424 U.S. 1, 39-51, 80 (1976));

(2) § 121.035(2) (App. 59), alleging that its prohibition on corporate employees "in any way handl[ing] any money . . . in any way for the purpose of aiding, assisting or advancing any candidate . . . in any way whatever" prevented KRL from making independent and issue advocacy expenditures;

(3) § 121.180(6)(a) (App. 82), alleging that the definition of "permanent committee" in § 121.015(3) ("a group of individuals . . . having as a primary purpose political activity which may include support of or opposition to selected candidates") required KRL to be regulated as a PAC (*see Buckley*, 424 U.S. at 79-80 and *MCFL*, 479 U.S. at 252 n.6, 262);

(4) § 121.180(6)(b) (App. 849), alleging that the 5% administrative fee on all PAC contributions and independent expenditures was a content-based burden on political speech without a compelling state interest;

(5) § 121.190(1) (App. 89), alleging that its prohibition on anonymous communications "intended for the support or defeat of candidates" prevented KRL from making constitutionally protected anonymous independent and issue advocacy expenditures (*see McIntyre v. Ohio Elections Commn.*, 115 S. Ct. 1511 (1995)); and

(6) §§ 121.150(6) and 121A.050(1) (App. 64, 96), alleging that their $500 contribution limits burdened KRL and KRLPAC's ability to make direct contributions, and that these statutes, coupled with the definitions "contribution" in §§ 121.015(6)(e) and 121A.010(11)(a)(5), respectively (App. 57, 95), and "permanent committee" in §§ 121.015(3)(c) and 121A.010(9)(c), respectively (App. 55, 93), limited KRL's ability to make both independent and issue advocacy expenditures, and direct contributions.

contributions to slates of candidates for Governor and Lieutenant Governor. The district court upheld, and the Kentucky legislature did not amend or repeal, these provisions. The jurisdiction of the district court was based upon 28 U.S.C. §§ 1331 and 1343(c), and 42 U.S.C. § 1983.

Because the 1995 elections for statewide and legislative office in Kentucky were fast approaching, and these statutes at issue reduced petitioners' abilities to participate in them, they moved the district court to preliminarily enjoin the enforcement of these statutes. The State moved for summary judgment, denying that a case or controversy existed with respect to some of petitioners' challenges.

The district court consolidated the two motions and, on November 2, 1995, ruled that the five percent tax on PAC contributions and independent expenditures in § 121.180(6)(b) was unconstitutional, and permanently enjoined its enforcement. The court, also, found that no case or controversy existed with respect to §§ 121.025, 121.035(2) and 121.180(6)(a) based on the State's litigation position that it had never enforced them, nor did it intend to, as the statute's plain terms would allow. App. 17-18). The remaining statutes were deemed to be constitutional. App. 18. Petitioners appealed.

After petitioners filed their initial appellate brief, the Kentucky legislature amended or repealed the statutory language upon which petitioners based several of their claims. App. 18. The court of appeals noted that "many of the amendments appear to be in direct response to plaintiffs' suit." (App. 18 n.14). While the chronology of events could have led to this conclusion, *see Payne v. Bd. of Educ., Cleveland City Schs.*, 88 F.3d 392, 399 (6th Cir. 1996) ("[C]hronological evidence is one factor that may be considered in determining whether a party's lawsuit had a catalytic effect with regard to an allegedly beneficial outcome."), the court may also have had in mind that the defendants Registry of Election Finance recommended to the

Kentucky legislature all but one of the amendments in order to address most of petitioners' claims. App. 99, 141.

As a result, the circuit court dismissed these claims as moot. (App. 22-25). Petitioners argued, however, that the court retained appellate jurisdiction to decide the constitutionality of the former statutes under the "voluntary cessation" exception to the mootness doctrine. (App. 24). The court rejected this argument and, instead of vacating the district court's decision as to these claims, affirmed it. (App. 37).

Petitioners filed a petition for rehearing, which the circuit court denied, and then petitioned this Court for a *writ of certiorari*, but did not question the court of appeals' ruling that several of petitioners' challenges had been mooted by the amendments. App. 124-32. This petition was denied. 118 S. Ct. 162.

Petitioners moved the district court for attorneys' fees, which it denied because the amendments did not change the manner in which the State defendants alleged they had enforced the challenged statutes. App. 38-41. The court of appeals affirmed on the ground that the amendments did not benefit petitioners because the State had not enforced the challenged statutes against petitioners in 20 years. App. 6. The court acknowledged, however, that in the absence of a binding policy against non-enforcement, a history of non-enforcement against petitioners would not make a threat of prosecution incredible. App. 6. The court, therefore, looked to two other factors to affirm the district court.

The court of appeals found that petitioners' litigation strategy of "continu[ing] their appeal" (i.e., raising the "voluntary cessation" exception to mootness) and in filing a petition for certiorari (which did not question the court of appeals' mootness holding) was inconsistent with the normal actions of a prevailing party. App. 6. The court also relied on the fact that petitioners had failed to accept the State's offer to issue an *ultra vires* advisory opinion, which allegedly would have protected petitioners from prosecution

for conduct in which they sought to engage in the future. App. 6-8.

REASONS FOR GRANTING THE WRIT

I. Introduction

This petition concerns entitlement to attorneys' fees when legislative amendments moot a challenge to statutes that facially abridge the First Amendment. Ultimately, however, it is an Article III standing case because of the grounds upon which the court of appeals denied petitioners prevailing party status.

This petition asks the Court to conclude that the Sixth Circuit, consistent with only the Eleventh Circuit, departed from the precedents of this Court and several circuits when it decided that, even though a plaintiff alleges an intention to engage in conduct proscribed by the challenged statute: (1) statutes facially abridging First Amendment freedoms do not cause injury when the State takes a litigation position that the statutes will not be enforced according to their plain terms, and (2) a credible threat of prosecution cannot be presumed from the mere existence of an unconstitutional statute that carries with it criminal sanctions.

II. A party whose 42 U.S.C. § 1983 suit is the "catalyst" behind the defendant's voluntary action that produces some or all of the relief sought by a judgment is entitled to attorney's fees under 42 U.S.C. § 1988.

In *Hewitt v. Helms*, 482 U.S. 755 (1987), this Court reiterated that formal relief is not necessary for entitlement to attorney's fees under 42 U.S.C. § 1988 if the plaintiff can establish that his lawsuit was the "catalyst" that provoked the defendant into affording the plaintiff at least some of the relief requested:

> It is well settled, of course that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment--e.g., a monetary settlement or a *change in conduct that redresses the plaintiff's grievances*. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. [*Id.* at 760-61 (emphasis added); *see also Maher v. Gagne*, 448 U.S. 122, 129 (1980) ("'parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief'") (citation omitted).]

More specifically, a plaintiff whose § 1983 suit has been mooted by legislative amendments must "demonstrate a clear causal link between his lawsuit and the State's amendment of its regulations." *Id.* at 763. In petitioners' initial appeal, the Sixth Circuit stated that "[i]n fact, many of the amendments [which the court found mooted several claims] appear to be in direct response to plaintiffs' suit." App. 18 n.14.

III. The Sixth Circuit departed from the decisions of this Court and other circuits holding that when a plaintiff alleges an intent to engage in First Amendment activity, which a challenged statute proscribes and whose enforcement has not been previously disavowed, the existence of the statute is the source of the injury.

On appeal from the district court's denial of petitioners' motion for attorneys' fees, the court of appeals did not revisit its prior conclusion that petitioners' suit appeared to be the direct cause of legislative amendments

mooting the case because, in the court's view, there was no actual benefit to petitioner from the amendments. It reached this conclusion by making a *post hoc* determination that there was no case or controversy before the statutes had been amended. App. 6.

The court of appeals made this decision without any reference to the text of the statutes at issue, relying instead on the fact that defendants had never enforced the challenged statutes against petitioners, as well as petitioners' litigation position and strategy. App. 6-8. In doing so, the Sixth Circuit departed from the established rule of this Court and other circuits, which have deemed the chilling effect of statutory language on a plaintiff who has alleged an intent to engage in First Amendment activity to be dispositive of standing.

This decision undercuts the reason for § 1988's existence: "to encourage litigation protecting civil rights" and "to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights." *Kay v. Ehrler*, 499 U.S. 432, 436 (1991); *see also Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances.") (citation omitted). The Sixth Circuit's decision may mark the beginning of the end for pre-enforcement challenges to statutes facially abridging the First Amendment. Not so, however, if the standing jurisprudence of this Court and most circuits is reaffirmed.

In *Doe v. Bolton*, 410 U.S. 179 (1973), this Court held that the plaintiffs had standing "despite the fact that the record d[id] not disclose that any one of them ha[d] been prosecuted, or threatened with prosecution." *Id.* at 188. It was sufficient that the plaintiff was the "one against whom *these criminal statutes* operate." *Id.* (emphasis added). The plaintiff had the requisite intent and the challenged statute proscribed the conduct flowing from that intent. *Doe*, however, was not even a First Amendment case. The

discrete injury arising from the self-censoring effect of a statute abridging First Amendment rights exists *a fortiori* in such cases.

In *Babbitt v. United Farmworkers National Union*, 442 U.S. 289, 301, 302 (1979), the plaintiffs had standing to lodge a pre-enforcement challenge on First Amendment grounds because three simple predicates were met: (1) the plaintiffs "alleged in their complaint an intention to engage in the [proscribed activity]"; (2) the statute "on its face proscrib[ed] [such activity]"; and (3) the "State ha[d] not disavowed any intention of invoking the [statute's] criminal penalty provision." Consequently, the plaintiffs were "not without some reason in fearing prosecution." *Id.* at 301, 302. This formulation has become the bellwether in pre-enforcement facial challenges on First Amendment grounds.

Similarly, in *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988), plaintiffs had standing to challenge a statute on First Amendment grounds in the absence of any evidence of actual or threatened prosecution because the "*law* is aimed directly at the plaintiffs, who, if their interpretation of the statute is correct, will have to take significant costly compliance measures or risk criminal prosecution." *Id.* at 392 (emphasis added). In addition, echoing *Babbitt*, this Court observed that the "State has not suggested that the newly enacted law will not be enforced, and [the Court] saw no reason to assume otherwise." *Id.* at 393. Because the injury arose from the statute, this Court held that the "alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Id.* at 393.

Even though the State in *American Booksellers*, as here, took a litigation position that the statute's coverage was much narrower than that alleged by the plaintiffs, this did not enter into the standing determination. Nor was it relevant on the merits because the litigation position was unenforceable. *Id.* at 395 ("as the [Virginia] Attorney General does not bind state courts or local law enforcement authorities, [this Court

was] unable to accept her interpretation of the law as authoritative"); *see also Hynes v. Mayor and Council of Oradell*, 425 U.S. 610, 622 n.6 (1976) (rejecting Chief of Police's narrowing construction of ordinance to avoid vagueness challenge because "it does not purport to be binding on enforcement authorities.").

The circuit courts of appeal have been even more explicit that where a plaintiff alleges an intention to engage in statutorily proscribed activity, a statute's existence causes injury, especially when the First Amendment is implicated. In *International Society of Krishna Consciousness v. Eaves*, 601 F.2d 809, 817 (5th Cir. 1979), "no one ha[d] ever been charged with enforcing the [challenged] ordinance" and plaintiffs "ha[d] not yet engaged in any conduct punished or otherwise proscribed by the ordinance."

This was without consequence. The only matter the court focused on to determine whether there was an Article III controversy before it was the "plaintiff's interest in 'engag[ing] in a course of conduct, arguably affected with a constitutional interest, but *proscribed by a statute*.'" *Id.* at 819 (quoting *Babbitt*, 442 U.S. at 298) (emphasis added).

In *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987), the attorney general alleged that he "played no part in [the plaintiff's] arrest, did not threaten [the plaintiff] with enforcement of the statute, and allegedly did not intend to enforce the statute against [the plaintiff]." Nonetheless, the court found two injuries: "not only the threat of future prosecution, but an ongoing injury resulting from the statute's chilling effect on his desire to exercise his First Amendment rights." The court then restated the "legal principle underlying" this Court's standing jurisprudence: a "controversy exists not because the state official is himself a source of injury, but because the official represents the state whose *statute is the source of injury*." *Id.* at 947 (emphasis added).

The court summed up its standing determination by concluding that a "plaintiff challenging the constitutionality

of a state statute has a sufficiently adverse legal interest to a state enforcement officer sued in his representative capacity when, as here, the plaintiff shows an appreciable threat of injury *flowing directly from the statute*." *Id.*

In *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989), the defendant's arguments were similar to those raised in the present case. Relying on *Poe v. Ullman*, 367 U.S. 497 (1961), where this Court held that a challenge to ban on contraceptives was not justiciable because it had not been enforced in 75 years, the state contended that the plaintiffs did not have standing to challenge various portions of California's Elections Code because the provisions at issue "ha[d] never been enforced." *Eu*, 826 F.2d at 821.

The court, however, looked at the "aftermath of *Poe*," which teaches that those charged with enforcement can and do change enforcement policy. *Id.* at 836 n.15. In addition, the court observed that "in light of the plain statutory language . . ., the apparent disavowal of any intention to enforce these laws is 'anomalous.'" *Id.* at n.16 (citation omitted). Here, again, the statute is the source of the injury, not a record of enforcement nor even a litigation position consistent with such a record.

The Eighth Circuit walks in step. In *United Food and Commercial Workers International Union, AFL-CIO, CLC*, 857 F.2d 422 (8th Cir. 1988), the court found the challenged statute to be the source of injury:

> "[W]here the enforcement of a regulatory statute would cause plaintiff to sustain a direct injury, the action may be properly maintained, whether or not the public officer has "threatened" suit; *the presence of the statute is threat enough*," at least where the challenged statute is not moribund." [*Id.* at 428 (citation omitted) (emphasis added).]

This was true notwithstanding affidavits submitted that the defendants did not presently intend to enforce the statute at issue. Again, people change their minds:

> "[P]resent intentions may not be carried out," and "it is not certain that changes in leadership or philosophy might not result in reinstitution of the [challenged] policy." . . . Because defendants . . . are "free to return to [their] old ways," the public interest in having the legality of the statutes settled prevents a finding of nonjusticiability in this case." [*Id.* at 430 (alterations in original).]

This possibility of an enforcement officials' change of mind also loomed in *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), where the FEC had promulgated a rule that restricted the plaintiffs' ability to solicit political contributions from its members. The plaintiffs ceased making such communications with their members and sought an advisory opinion from the FEC, which the commission voted not to issue. Plaintiffs then brought a pre-enforcement challenge to the rule.

The FEC contended that the plaintiffs did not have Article III standing because the Commission had voted not to issue an advisory opinion to the plaintiffs regarding whether the contested rule applied to them, such a vote also being necessary to commence an enforcement action. The court of appeals rejected this argument, holding that "[n]othing . . . prevents the Commission from enforcing its rule, at any time with, perhaps, another change of mind of one of the Commissioners." *Id.* at 603.

Moreover, because the plaintiffs had been "*arguably* chilled" from making the communications prohibited by the administrative rule, they had suffered a discrete injury and had standing on this ground to bring a First Amendment-based pre-enforcement challenge. *Id.* at 603-04 (emphasis

added). Again, the arguable effect of the *statute* is the source of the injury so long the *possibility* of enforcement remains. *Id.* at 603-604.

In *New Hampshire Right To Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996), the court distilled standing case law and found two grounds for standing: (1) the threat that the challenged statute will be enforced, and (2) self-censorship of speech in order to avoid prosecution. *Id.* at 13.

Based upon the plaintiff's record of having made, and intending to make, expenditures that "at least arguably fall with the statutory definition" challenged in *Gardner*, both grounds were present as it was highly probable that at some point the plaintiff would either be in violation of the statute or be forced to self-censor for fear of the consequences. *Id.* at 16 (emphasis added).

The defendants did nothing to rebut this likelihood. Before suit was filed one defendant stated that the statute would be enforced and another defendant refused to disclaim the possibility of enforcement and defended the statute's constitutionality. *Id.* at 16-17. Consequently, there was "more than enough in the record" to confer standing. Again, as in *Chamber of Commerce*, the injury, whether the actual threat of enforcement or the plaintiff's self-censorship, flows from the challenged statute.

There is no question in this case that petitioners' § 1983 suit was the catalyst behind the legislative amendments mooting the appeal of several claims in the Sixth Circuit. In determining, however, that petitioners did not benefit from the Kentucky legislature's amendments to the statutes at issue, without referring to the statutory language challenged and its arguable affect on petitioners' intended conduct, the Sixth Circuit departed from the standing jurisprudence of this Court and several circuits.

In the Sixth Circuit, dispositive standing considerations include whether the government has taken a self-serving litigation position concerning the reach of

challenged statutes, as well as other irrelevant factors, such as a plaintiff's litigation position regarding the court of appeals' appellate jurisdiction, and a plaintiff's decision to forgo administrative remedies, apparently considered on an *ad hoc* basis. If this type of reasoning is allowed to stand, "effective access to the judicial process" for civil rights plaintiffs, the reason for § 1988's enactment, *Hensley*, 461 U.S. at 430, will inevitably wane.

IV. The Sixth Circuit departed from the decisions of this Court and other circuits holding that when a plaintiff alleges an intent to engage in First Amendment activity, which a challenged statute proscribes, a credible threat of prosecution is assumed absent compelling contrary evidence.

Even if a plaintiff can show that the statute is the source of his injury by alleging an intent to engage in conduct proscribed by the statute, the threat of prosecution does bear on the standing determination, but only in the most attenuated sense when First Amendment rights are at stake. Quoting *Doe*, 410 U.S. at 188, this Court stated in *Babbitt* that "[w]hen the plaintiff ha[s] alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" 442 U.S. at 298.

This "credible threat of prosecution" standard, however, "is quite forgiving." *Gardner*, 99 F.3d at 14. The plaintiffs in *Babbitt* had standing to lodge a pre-enforcement challenge on First Amendment grounds because they had "alleged in their complaint an intent to engage in the [statutorily proscribed activity]" and the statute "on its face proscribe[d such activity]." *Id.* at 301-02. Consequently, the plaintiffs were "not without some reason in fearing prosecution." *Id.* at 302.

While the Court also observed that the "State had not disavowed any intention of invoking" criminal prosecution under the contested statute, in light of *American Booksellers*, 484 U.S. at 395, this consideration must be read to mean that only an authoritative or binding policy (such as an administrative rule or a formal Attorney General's opinion that fetters executive branch discretion[2]) against enforcement can bear on the presumed threat of prosection. *American Booksellers presumed* a threat of prosecution merely because of the "law['s] . . . aim[]" and the fact that Virginia had not provided an authoritative policy against enforcement according of the statute at issue. *Id.* at 392, 395.

The First Circuit in *Gardner* considered *Doe*, *Babbitt*, *American Booksellers* and other circuit decisions and distilled a bright line rule for standing in First Amendment anticipatory challenges to statutes:

> The preceding cases make clear that when dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence. [99 F.3d at 15.]

The Fifth Circuit in *Eaves* proceeded on this assumption when it determined whether there was an Article III controversy before it. The court focused on the

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[2] *See, e.g.*, *Cox v. D'Addario*, 570 N.W.2d 284, 291 (Mich. App. 1997) ("[A]n opinion of the Attorney General is binding on state agencies and officers . . . ."); *but see York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. 1991) ("The government officials are expected to abide by the opinion until a court decrees otherwise or the legislature changes the law. An attorney general's opinion is highly persuasive, but not binding on the recipient.").

"plaintiff's interest in 'engag[ing] in a course of conduct, arguably affected with a constitutional interest, but *proscribed by a statute*.'" 601 F.2d at 819 (quoting *Babbitt*, 442 U.S. at 298) (emphasis added).

Likewise, in *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495 (10th Cir. 1995), the court, citing *Babbitt*, recognized that in First Amendment cases it need find only a "'[r]easonable predictability of enforcement or threats of enforcement, without more." *Id.* at 1499-1500.

Such predictability was found, though there was "no affirmative evidence that prosecution for violating the [contested] statute [wa]s imminent," because "New Mexico ha[d] not affirmatively disavowed any intention of bringing criminal prosecution against [the plaintiff]." *Id.* at 1502. Notably, the court held that a litigation position disavowal would have been disregarded. *Id.* at 1505 n.2 ("[E]ven if such representations had been made, it is unlikely they would [have] alter[ed] [the court's] conclusion.").

Eu presumed a threat of prosecution, notwithstanding lack of enforcement under the statute. The Ninth Circuit found *Babbitt* controlling, wherein the statutes proscribed the plaintiffs' alleged course of conduct, and the statutes had not been "'commonly and notoriously violated,'" 826 F.2d at 822, *i.e.*, they were not moribund.

The same was true in *Chamber of Commerce*. In addition to finding a threat of enforcement based, in part, on the possibility that the FEC could change their enforcement policy, the D.C. Circuit found standing because First Amendment rights were at stake and "*arguabl*[*e*] chill[]" caused by the contested rule was an independent basis for the court's jurisdiction. 69 F.3d at 603 (emphasis added).

Citing *American Booksellers*, *Gardner* and *Gonzales*, the Seventh Circuit in *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 149 F.3d 679 (7th Cir. 1998) found standing because the plaintiff "properly alleged its intention to engage in conduct proscribed by the

[challenged statute]." The threat of prosecution was presumed:

> [P]laintiff also made the necessary threshold showing of a credible threat of prosecution for its (present and/or future) violation of the Act. The Supreme Court has instructed us that a threat of prosecution is credible when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will *not* enforce the statute. *Id.* at 687 (emphasis in original).[3]

Finally, the Fourth Circuit in *North Carolina Right To Life, Inc. v. Bartlett*, 1999 WL 74739 (4th Cir. Feb. 17, 1999), again, confirmed that a litigation position will not rebut a credible threat of prosecution. As in the present case, the State argued that it had never interpreted the challenged statutes, nor did it intend to, according to their plain terms. *Id.* at *3. Citing *Bolton*, *Stocker* and *Gardner*, the Fourth Circuit invoked the "presumption" of a "credible threat of prosecution" relied upon in those cases. *Id.* The court observed that the challenged statute "appears by its terms to apply to [the plaintiffs]," the plaintiff is chilled from engaging in protected activity, and the "State's litigation position--that it does not interpret [the challenged statutes] to encompass [protected speech] fails to alter our analysis." *Id.* at *3, 4.

The plaintiffs were "left . . . with nothing more than the State's promise" not to prosecute, *id.* at *4, which can be revoked at any time, deterring the exercise of political speech:

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[3] The other factors cited by the court, such as the government's investigation of the plaintiff, served to "*enhance* the credibility of [the plaintiff's] threat of prosecution." *Id.* (emphasis in original). Thus, they were not necessary predicates.

> [The plaintiffs'] First Amendment rights would exist only at the sufferance of the State Board of Elections. It has no guarantee that the Board might not tomorrow bring its interpretation more in line with the provision's plain language. Without such a guarantee, [the plaintiffs] will suffer from the reasonable fear that it can and will be prosecuted for [violating the challenged statutes], and its constitutionally protected speech will be chilled as a result. [*Id.*]

The Sixth Circuit's standing jurisprudence is consistent with only one other circuit, the Eleventh. In *Wilson v. State Bar of Georgia*, 132 F.3d 1422 (11th Cir. 1998), a credible threat of prosecution was not presumed.[4] Rather, while agreeing with the characterization that the standard is "'quite forgiving,'" *id.* at 1428 (quoting *Gardner*, 99 F.3d at 14), the court held that the threat was not present because, *inter alia*, "there was no evidence regarding specific threats" and the defendants has taken a litigation position against enforcement. *Id.* at 1428-29.

Obviously, in any of the aforementioned circuits but the Sixth and the Eleventh, petitioners would have had standing and, thus, would have benefited for purposes of § 1988 attorneys' fees from the Kentucky legislature's amendments to the challenged statutes in this case. Petitioners alleged an intention to engage in a course of conduct that was at least *arguably* proscribed by the challenged penal statutes and defendants had not disavowed an intent to enforce them. The State's litigation position that they had not enforced, and did not intend to enforce, the

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[4] This pre-enforcement case, perhaps, should not have been analyzed on First Amendment standing grounds because the rules challenged--measures imposed upon lawyers who employ disbarred attorneys that prevent the latter from engaging in the unauthorized practice of law--were obviously not aimed at First Amendment activity.

statutes at issue as their terms allow was no more than a self-serving, unreliable *post hoc* promise. Departing from well settled standing jurisprudence, the Sixth Circuit relies on irrelevant considerations that threaten to eviscerate access to the courts for civil rights plaintiffs.

A. A plaintiff's litigation position that the federal court retains jurisdiction to decide the constitutionality of former statutes after they have been amended is not compelling evidence that the presumed credible threat of prosecution did not exist.

The Sixth Circuit, in an apparent attempt to grasp for something that would rebut the presumed credible threat of prosecution, first, almost in passing, recounted that petitioners "continued their appeal of the district court's decision in the prior suit to this Court and later sought certiorari from the Supreme Court." App. 6. The Sixth Circuit considered this to be "inconsistent with the actions one would normally expect from a prevailing party." *Id.* This statement by the Sixth Circuit is factually incorrect. Petitioners did seek a writ of certiorari from this Court but did not question the court of appeals' conclusion that the legislative amendments mooted certain claims. App. 124-32.

In addition, petitioners "continu[ation] of [their] appeal" simply amounted to a litigation position taken that, under the "voluntary cessation" exception to the mootness doctrine, the federal court retains jurisdiction to provide declaratory relief with respect to the former statutes under challenge if the defendant is free to reinstate the allegedly invalid statutes after the case is dismissed. *See Northeastern Fla. Contractors v. Jacksonville*, 113 S. Ct. 2297, 2301 (1993); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Consequently, petitioners argued in their reply brief, after the legislative amendments, that "because

the State has stubbornly maintained that these provisions are constitutional, and the lower court has held them to be so, this Court should declare their former language unconstitutional to ensure the State does not change its mind again and reenact them." [App. 137.]

But even if petitioners raised this argument erroneously, *see Massachusetts v. Oaks*, 491 U.S. 576, 583 (1989), petitioners were not implying that their speech was presently chilled by the amended statutes. They were only relying on what appears to be a legitimate ground, *see* Erwin Chemerinsky, *Federal Jurisdiction*, § 2.5.4, at 137 (2d. ed. 1994) (stating that there is some difficulty reconciling the cases), for the court of appeals to retain jurisdiction to issue a declaratory judgment. Consequently, petitioners' litigation position is not compelling contrary evidence of a credible threat of prosecution.

B. An administrative agency's offer to issue an *ultra vires* advisory opinion to protect the plaintiff from future prosecution does not rebut a presumed credible threat of prosecution.

The court of appeals, also, found the State's post-filing offer to issue an advisory opinion to protect petitioners from future prosecution made the threat of prosecution incredible. App. 6-8. This is a departure from established civil rights law. "[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982). Section 1983 actions "'exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable *in the first instance*.'" *Felder v. Casey*, 487 U.S. 131, 148 (1988) (emphasis in original) (citation omitted). The decision not to pursue an *ultra vires*

advisory opinion (a form of administrative relief that a § 1983 plaintiff need not pursue), therefore, is irrelevant to a § 1983 plaintiff's standing.[5]

Moreover, even if the pursuit of such a remedy was obligatory before commencing a § 1983 claim, the advisory opinion remedy under Kentucky law would not remove the chill to speech. First, the Registry of Election Finance has up to 30 days to issue an opinion, but cannot issue one before a ten-day comment period has elapsed. Ky. Rev. Stat. Ann. § 121.135(1),(5)(a); App. 63, 65. In addition, an advisory opinion covers only the "specific transaction or activity by the person" making the request for an advisory opinion. § 121.135(1),(4)(a)(c); App. 63-65. No exceptions are permitted. § 121.135(3). App. 64. Consequently, persons who wishes to engage in statutorily proscribed, but constitutionally protected, speech must seek a dispensation from the state each time they wish to speak. This Court held in *Buckley v. Valeo*, 424 U.S. 1, 40 n.47 (1976) that the plaintiffs were not required to invoke the Federal Election Campaign Act's advisory opinion mechanism, in part, because the FEC had a "'reasonable time'" to issue one and this potential delay would not assure the plaintiffs that their vagueness concerns with the statute at issue would be "remedied prior to the chilling of political discussion." Likewise, here, requiring a political speaker to wait a minimum of 10 days and up to 30 days each and every time they wish to speak in a manner that is prohibited or regulated

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[5] The Registry is without authority to issue an advisory opinion with respect to Chapter 121A. § 121.135(1). App. 60. No exceptions. § 121.135(3); App. 61. The court of appeals recognized, but discounted, this problem by attempting to authoritatively extend the reach of advisory opinions issued under Chapter 121 so as to cover Chapter 121A. App. 7. In so doing, the court of appeals apparently forgot that "only state courts may authoritatively construe state statutes." *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1600 (1996). "'[Federal courts] lack jurisdiction authoritatively to construe state legislation.'" *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).

by the clear statutory language at issue would not remove the statute's chilling effect prior to engaging in protected speech.

The court of appeals did not believe that petitioners were "unduly burdened by being required to request an advisory opinion each time they desire to engage in activity of questionable legality." App. 7. However, having to seek a dispensation from state officials *before* engaging in protected political speech effectively amounts to a system of unconstitutional prior restraints. Given the clear statutory language at issue, the Registry of Elections would have the discretion each time a request for an advisory opinion is received to apply the statutes according to their plain terms or effectively rewrite them so as to avoid constitutional infirmities. This is an evil not tolerated by the First Amendment. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990) ("[A] scheme that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint" and "will not be tolerated.").

This Court has recognized that the legal service marketplace is inadequate to address civil rights grievances:

> [V]ictims [of civil rights violations] ordinarily cannot afford to purchase legal services at the rates set by the private market. Moreover, the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries. [*City of Riverside v. Rivera*, 477 U.S. 561, 576-77 (1986).]

This economic deterrent is even more pronounced in cases like this where the relief requested is limited to declaratory and injunctive relief.

Section 1988's remedy to this problem, however, is not so much to enable redress of wrongs to individuals but to benefit the public in intangible terms:

> Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. And, Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above a civil rights remedy to a particular plaintiff."
>
> * * *
>
> Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit "'does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance.'" "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizens, suffers." [*Id.* at 574, 575 (citations omitted).]

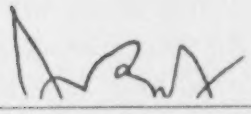
In this same light, this Court has observed that section 1988 is, also, a tool to coerce the States into complying with civil rights law. *See Evans v. Jeff D.*, 475 U.S. 717, 731 (1986) ("Congress enacted the fee-shifting provision as 'an integral part of the remedies necessary to obtain' compliance with civil rights laws, to further the same general purpose--promotion of respect for civil rights--that led it to provide damages and injunctive relief.") (citation omitted).

Left to stand, the Sixth Circuit's departure from established standing jurisprudence will disable victims of constitutional violations from being able to seek redress. It will, also, encourage the states to deter its citizens from engaging in protected political speech through facially overbroad statutes. The states need only take a litigation position that the words of the challenged statutes do not mean what they say: "Don't worry, just trust us" will be the prevailing mantra.

CONCLUSION

In concluding that petitioners did not benefit from (even though they provoked) the legislative amendments mooting their claims, the court of appeals departed from the precedents of this Court and several other circuits, which hold that an Article III injury arises from the existence of a statute proscribing First Amendment activity by the class to which the plaintiff belongs and if there is a credible threat of prosecution. Under such circumstances, a threat is presumed in the absence of compelling contrary evidence. Such evidence does not include a party's litigation position regarding the likelihood of enforcement or the jurisdiction of the court, or the decision to forbear an administrative remedy. The Sixth Circuit's deviation from established First Amendment standing jurisprudence threatens to undercut the ability of victims of civil rights injuries to seek redress, and to embolden the states to enact speech-inhibiting statutes. For the foregoing reasons, petitioners request this Court to grant them a petition for a writ of *certiorari*.

Respectfully submitted,



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Supreme Court, U.S.
FILED

No. 98-1626 APR 8 - 1999

OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term 1998

KENTUCKY RIGHT TO LIFE, INC., et al.,
Petitioners,

v.

DAVID STENGEL, as Commonwealth Attorney for Jefferson County, Kentucky, and as a representative of the class of Commonwealth Attorneys in the State of Kentucky, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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NOT FOR PUBLICATION

No. 97-6150

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENTUCKY RIGHT TO LIFE, INC.;
KENTUCKY RIGHT TO LIFE POLITICAL ACTION COMMITTEE (KRLPAC);
ROBERT ZOELLER; LORA ROBERTSON, Treasurer of Kentucky Right to Life Political Action Committee,
Plaintiffs - Appellants,

v.

DAVID STENGEL, as Commonwealth Attorney for Jefferson County, Kentucky,
and as a representative of the class of Commonwealth Attorneys in the State of Kentucky;
A. B. CHANDLER, II, as Attorney General for the State of Kentucky; DON COX, as Chairman of the Registry of Election Finance of the State of Kentucky;
SCOTT MADON, as a Member of the Registry of Election Finance; D. SCOTT FURKIN, as a Member of the Registry Election Finance;
JUDITH GRISHAM CLABES, as a Member of the Registry of Election Finance;
DAYNA MATTHEW, as a Member of the Registry of Election Finances; ROBERT E. SANDERS,
as a Member of the Registry of Election Finance;
R. KENT WESTBERRY, as a Member of the Registry of Election Finance, all in their official capacities,
Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

ENTERED: January 8, 1999

BEFORE: SUHRHEINRICH and CLAY, Circuit Judges; and CARR, * District Judge.

PER CURIAM. This is an action for attorneys' fees under 42 U.S.C.A. § 1988(b) (West Supp. 1998) arising from the plaintiffs' challenge to Kentucky's campaign finance laws being rendered partially moot because of recent state legislation. We **AFFIRM** the district court's denial of the attorneys' fees.

I. BACKGROUND

Plaintiff Kentucky Right to Life ("KRL") is a non-profit corporation engaged in educating the public on abortion related issues, restoring protection of rights to the unborn, and promoting the sanctity of all innocent life. Plaintiff Kentucky Right to Life Political Action Committee ("KRLPAC") is an internal political action committee of KRL. Plaintiff Robert Zoeller is a resident of Kentucky who has contributed to KRL and KRLPAC in the past and intends to do so in the future. Plaintiff Lora Robertson is the treasurer of KRLPAC. The defendants, David Stengal, A. B. Chandler, II, Don Cox, Scott Madon, D. Scott Furkin, Judith Grisham Clabes, Dayna Matthew, Robert E. Sanders, and R. Kent Westberry, are Kentucky officials charged with the administration and enforcement of the state campaign finance laws.

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* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

In this present action, Plaintiffs appeal from the district court's denial of their application for attorneys' fees. Plaintiffs' request arises from a prior lawsuit in which they challenged the constitutionality of Kentucky's campaign finance laws. *See Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 162 (1997). In the prior suit, Plaintiffs contended that the campaign finance laws unconstitutionally restricted their right to engage in free political speech. As a result of Plaintiffs' prior action, the district court invalidated a statute imposing a five percent administrative fee on political committees. However, the district court upheld the constitutionality of several of the challenged statutes and held there was no justiciable case or controversy as to the remaining challenged statutes. As to the statutes providing no justiciable controversy, the district court found that the Kentucky Registry, the agency charged with enforcement of the campaign finance laws, never interpreted the statutes as broadly as Plaintiffs asserted. Rather, the Registry acquiesced in binding Supreme Court precedent when enforcing the statutes. *See id.* at 640-42.

Plaintiffs appealed the district court's decision in the prior suite. Meanwhile, the Kentucky legislature amended some of the challenged statutes. On appeal, our Court rendered the challenge to the amended statutes moot. This Court also affirmed the district court's decision upholding the constitutionality of the remaining statutes. *See id.* at 643-51.

As a result of the Kentucky legislature amending the campaign finance laws, Plaintiffs instituted the present action for attorneys' fees based on their challenge to the statutes, claiming they were the "catalyst" for the legislation. The district court granted Plaintiffs proportionate attorneys' fees for prevailing on their challenge to the five percent administrative fee, but denied the remainder of Plaintiffs' request for attorneys' fees. The district court ruled that Plaintiffs were not a "prevailing party" because the

Registry's behavior toward Plaintiffs was not altered. Plaintiffs appeal from that decision.

II. DISCUSSION

Congress has endorsed attorneys' fees awards if specified civil rights are vindicated. In particular, Congress has provided:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Right Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title,, [sic] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, excepts that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C.A. § 1988(b).

A plaintiff, before he is eligible to recover attorneys' fees under 42 U.S.C.A. § 1988(b), must have "prevailed" in an action or proceeding brought under the statute. *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989). To be considered a prevailing party, a plaintiff "must obtain at least some relief on the merits of his claim." *Farrar v. Hobby*, 506 U.S. 103, 111 (1992). That is

to say, "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12.

This circuit has recognized that it is not necessary to actually receive judicially granted relief to qualify as a prevailing party. *See Woolridge v. Marlene Indus.*, 898 F.2d 1169, 1173 (6th Cir. 1990). Circumstances can arise when the lawsuit "'produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment -- e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances.'" *Id.* at 1173-74 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987). If that happens, the plaintiff is deemed to have prevailed even though a formal judgment was not entered in his favor. *See id.* at 1174. "Nevertheless, there must be some actual benefit to the plaintiff either in terms of monetary damages, injunctive relief, or a voluntary change in a defendant's conduct." *Id.*

In cases in which no judicially ordered relief is obtained the plaintiff must demonstrate that he was the "catalyst" for the defendant's changed behavior. *See Payne v. Board of Educ.*, 88 F.3d 392, 397 (6th Cir. 1996). That is, the plaintiff must show that his lawsuit was an important factor in obtaining the desired relief and that the defendant's actions were not gratuitous. *See Heeren v. City of Jamestown*, 39 F.3d 628, 631 (6th Cir. 1994). Additionally, a district court's determination of whether a plaintiff prevailed is reviewed for clear error. *See id.*

Plaintiffs claim that the district court erred in finding that Plaintiffs did not prevail in their lawsuit. Plaintiffs argue that they in pact prevailed because their suit was the "catalyst" for amendments to Kentucky's campaign finance laws, which in turn eliminated the chilling effect resulting from the allegedly unconstitutional statutes.

In order for the chill to have been sufficiently injurious that it would have conferred standing upon

Plaintiffs to raise the constitutionality of the campaign finance laws, the threat of prosecution must have been credible. *See Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1394-96 (6th Cir. 1987). Thus, Plaintiffs benefited from the legislature's act of amending the campaign finance laws only if the legislation eliminated a credible threat of prosecution. Accordingly, the threshold is whether the threat of prosecution against Plaintiffs prior to the legislation was credible.

We believe that the district court did not clearly err in finding that Plaintiffs did not prevail because the threat of prosecution was *not* credible. To begin with, for more than twenty years the Registry has not enforced the campaign finance laws against Plaintiffs. In the absence of a binding policy, this in itself may be sufficient to make the threat of prosecution incredible. *See New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996). However, other important factors support the district court's finding. First, even after the legislature amended the campaign finance laws, Plaintiffs continued their appeal of the district court's decision in the prior suit to this Court and later sought certiorari from the Supreme Court. This conduct on the part of Plaintiffs is inconsistent with the actions one would normally expect from a prevailing party. Second, the Registry offered Plaintiffs a binding advisory opinion that would protect them from prosecution for future conduct they were seeking to engage in. *See* Ky. Rev. Stat. Ann. § 121.135(4)(b) (Banks-Baldwin 1997) (providing that any person to whom an advisory opinion has been granted is protected from sanction for any act addressed in the opinion).

Plaintiffs attempt to downplay the significance of the protective mechanism by arguing that it did not adequately address the chilling effect the statutes, the delay, expense, and burden of using this mechanism would work an undue hardship. Plaintiffs' argument lacks merit. In order to receive an advisory opinion, Plaintiffs simply need to send in

a request. The Registry is required to render an advisory opinion not later than thirty days from receipt of the request. *See id.* § 121.135(1). Additionally, Plaintiffs are not unduly burdened by being required to request an advisory opinion each time they desire to engage in activity of questionable legality.

Second, Plaintiffs contend that reliance on an advisory opinion is limited to the requesting party. Specifically, Plaintiffs argue that reliance on an advisory opinion is limited to the requesting party. Specifically, Plaintiffs argue that none of their county affiliates would be able to rely on advisory opinions issued to them. Although correct, nothing prevents Plaintiffs from requesting and receiving an advisory opinion issued to both Plaintiffs and their affiliates.

Finally, Plaintiffs claim that the Registry can only issue an advisory opinion regarding conduct regulated by the provisions set out in Chapter 121 of Kentucky's Revised Statutes. This is true, but all the statutes that were amended by the Kentucky legislature, except for one, were provisions found in Chapter 121. As for the exception, Ky. Rev. Stat. Ann. § 121A.050(1) (Banks-Baldwin 1995), it was nearly identical in substance to another statute amended by the state legislature and found in Chapter 121, Ky. Rev. Stat. Ann. § 121.150(6) (Banks-Baldwin 1995). Both limited acceptance and receipt of specified political contributions to $500. The only difference between the two statutes is § 121.050(1) applied to contributions to slates of candidates, as defined in Chapter 121A, and § 121.150(6) applied to contributions to all other types of candidates and organizations. Therefore, any advisory opinion addressing conduct within the purview of § 121.150(6) would reasonably express the Registry's position regarding conduct within the ambit of § 121A.050(1). In any event, Plaintiffs failed to use the advisory opinion mechanism to protect any future conduct from prosecution.

In sum, the district court did not clearly err in finding that Plaintiffs did not prevail because the threat of prosecution prior to the legislation was not credible. Accordingly, we need not address whether Plaintiffs were the catalyst for the legislation.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's denial of attorneys' fees.

No. 95-6581

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENTUCKY RIGHT TO LIFE, INC.;
KENTUCKY RIGHT TO LIFE POLITICAL ACTION COMMITTEE(KRLPAC);
ROBERT OELLER;
LORA ROBERTSON, Treasurer of Kentucky Right to Life Political Action Committee,

Plaintiffs-Appellants,

v.

JOSEPH TERRY, et al.,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Western District of Kentucky

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Decided and Filed March 7, 1997
Entered March 7, 1997

Before: CONTIE, SUHRHEINRICH, and MOORE, Circuit Judges.

SUHRHEINRICH, Circuit Judge. Numerous Kentucky public officials have been convicted of abusing their political offices for personal gain over the past twenty-five years. To address this serious problem, the Kentucky General Assembly passed the Campaign Finance Law in 1974. *See* Ky. Rev. Stat. Ann. §§ 121.015-121.990 and Ky. Rev. Stat. Ann. §§ 121A.005-121A.990 (Banks-Baldwin

1995) (the Act").[1] The Act regulates political contributions and expenditures by groups and individuals in state and local elections and has been amended periodically by the Kentucky legislature.

In the fall of 1995, plaintiffs, a non-profit corporation, a political action committee ("PAC"), and an individual, brought facial constitutional challenges to numerous aspects of the Act. The named defendants were numerous Kentucky officials charged with enforcement of the Act [hereinafter State]. The district court granted summary judgment in favor of the State, and plaintiffs appealed.[2] After plaintiffs filed their brief with this Court, the Kentucky General Assembly amended various portions of the Act relevant to this appeal. Upon review, we hold that several of plaintiffs' challenges have been mooted by these amendments and that the Act survives plaintiffs' remaining constitutional challenges.

I. Background

A. Plaintiffs

Plaintiffs include Kentucky Right to Life ("KRL"), a non-profit corporation organized to protect the unborn and educate the public on abortion, Kentucky Right to Life Political Action Committee ("KRLPAC"), a separate political action committee within KRL, and Robert Zoeller. Both KRL and KRLPAC engage in political activity within the state of Kentucky through fundraisers, rallies, issue advocacy, and political contributions for and against candidates for public office. Mr. Zoeller has contributed to KRL and KRLPAC during previous years and wishes to

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[1] All future references are to Act unless otherwise indicated.

[2] The district court dismissed several claims for failure to state a case or controversy and sustained other challenges to the Act on the merits.

contribute freely to those organizations in the future. Plaintiffs alleged that the Act violated plaintiffs' First Amendment freedoms of speech and association by unconstitutionally restricting their political speech.

B. General Legislative Scheme

A brief introduction to the Act is necessary to understand plaintiffs' challenges. As noted previously, the purpose of the Act is to combat actual and perceived corruption in Kentucky politics by regulating contributions and expenditures in Kentucky public elections. The Act creates numerous specific limitations upon political activity by defining certain groups and activities in a definitional section and then regulating those groups and activities through other sections. For example, the Act defines "permanent committee" and "contribution" in the definitional section and then utilizes those defined terms in its regulatory sections. Interpreting the Act's defined terms, therefore, is critical in determining the scope and effect of the Act. The Registry of Election Finance, the state agency charged with enforcing the Act, routinely interprets this definitional section in determining its enforcement procedure.

Once a particular group or activity falls within a regulated category by virtue of the definitional section of the Act, the degree of regulation varies depending on: 1) the nature of the expenditure; and 2) the nature of the organization making that expenditure. The Registry has historically recognized three types of expenditures: 1) direct contributions; 2) independent expenditures; and 3) issue advocacy expenditures.[3] The Registry has also distin-

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[3] Direct contributions include those expenditures contributed directly to a political candidate or affiliated political action committee ("PAC") for the purpose of influencing an election. Independent expenditures include individually-sponsored advertisements expressly advocating the defeat or election of a clearly identified candidate. Independent expenditures differ from direct contributions in that the endorsed candidate or her PAC has no direct financial involvement with the independent expenditure. In

guished between corporations, PACs, and individuals. As to expenditures, direct contributions are regulated most heavily; issue advocacy expenditures receive only minimal scrutiny. As to regulated entities, large organizations are more strictly regulated than individual contributors, with corporations and political action committees, which typically possess extensive resources to influence elections, the most heavily regulated. In sum, the Act combats corruption by placing greater restrictions upon direct corporate and PAC contributions to political candidates, and lesser restrictions upon individual contributions and issue advocacy expenditures. Keeping this general scheme of broad regulation in mind, we now turn to plaintiffs' specific challenges to the Act presented before the district court.

C. District Court Proceedings

In the district court, plaintiffs presented various challenges to: 1) the Registry's interpretation of the definitional section of the Act; and 2) specific provisions of the Act.

Regarding the Act's definitional section, plaintiffs argued that the defined terms "contribution" and "permanent committee" were broad enough to encompass plaintiffs' activities, subjecting them to unconstitutional regulation under the Act.[4] Ky. Rev. Stat. Ann. § 121.015(3)(c) (Banks-

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effect, the expenditure is disbursed "independently" of the candidate which it supports. Finally, issue advocacy expenditures include those expenditures made for or against issues of public importance, rather than for the defeat or election of a clearly identified candidate. Proposed constitutional amendments and statewide ballot issues typically fall into this category.

[4] Section 121.015(6)(e) defined contribution in relevant part as any:

> [e]xpenditure in connection with any other activity undertaken independently of the activities of a candidate, slate of candidates, committee, or

Baldwin 1995), amended by Ky. Rev. Stat. Ann. § 121.015(3)(c) (Banks-Baldwin 1996 Acts Issue). Plaintiffs asserted a broad definition of "contribution" to include direct contributions as well as independent expenditures and issue advocacy expenses. Relying upon this broad definition, plaintiffs alleged that § 121.025 violated the Free Speech Clause by prohibiting plaintiffs from engaging in issue advocacy or making independent expenditures in connection with political candidates.[5]Ky. Rev. Stat. Ann. § 121.025 (Banks-Baldwin 1995), amended by Ky. Rev. Stat. Ann.

> contributing organization made or furnished for the purposes of influencing an election.

Ky. Rev. Stat. Ann. § 121.015(6)(e) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.015(6)(e) (Banks-Baldwin 1996 Acts Issue).

Section 121.015(3)(c) defined permanent committee, in relevant part, as:

> a group of individuals, including an association, committee, or organization, other than a campaign committee, political issues committee, inaugural committee, or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose political activity which may include support of or opposition to selected candidates, slates of candidates, political parties, or issues of public importance, and which functions on a regular basis throughout the year.

Ky. Rev. Stat. Ann. § 121.015(3)(c) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.015(3)(c) (Banks-Baldwin 1996 Acts Issue).

[5] Section 121.025 prohibited corporations from:

> contribut[ing], either directly or indirectly, any money, service or other thing of value towards the nomination or election of any . . . officer . . . in this state.

Ky. Rev. Stat. Ann. § 121.025 (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.025 (Banks-Baldwin 1996 Acts Issue).

§ 121.025 (Banks-Baldwin 1996 Acts Issue). Plaintiffs further asserted a broad definition of "permanent committee" to include organizations which advocate the election or defeat of clearly identified candidates as well as organizations which primarily address issues of public importance. Relying upon this broad definition, plaintiffs claimed that § 121.180(6)(a), which required all permanent committees to file financial reports with the Registry of Election Finance, violated the Free Speech Clause because it applied to organizations, like plaintiffs, which engage primarily in issue advocacy rather than direct candidate support.[6] Ky. Rev. Stat. Ann. § 121.180(6)(a) (Banks-Baldwin 1995), amended by Ky. Rev. Stat. Ann. § 121.180(6)(a) (Banks-Baldwin 1996 Acts Issue).

Plaintiffs also presented direct constitutional challenges to six regulatory provisions of the Act. First, plaintiffs alleged that § 121.025, which prohibited corporations from making direct contributions to political candidates, violated the Free Speech Clause because it applied to nonprofit corporations which do not pose a significant threat of corruption to the political process.[7] Second, plaintiffs alleged that § 121.035(2), which prohibited corporate employees from handling funds earmarked for independent expenditure or issue advocacy, violated the Free Speech Clause by precluding plaintiffs

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[6] Section 121.180(6)(a) provided in relevant part:

> [e]ach permanent committee . . . shall make a full report, upon a prescribed form, to the registry of all money, loans, or other things of value, received by it from any source, and all expenditures authorized, incurred, or made, since the date of the last report.

Ky. Rev. Stat. Ann. § 121.180(6)(a) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.180(6)(a) (Banks-Baldwin 1996 Acts Issue).

[7] *See supra* note 5.

from engaging in issue advocacy or making independent expenditures in connectionwith political elections.[8] Ky. Rev. Stat. Ann. § 121.035(2) (Banks-Baldwin 1995), amended by Ky. Rev. Stat. Ann. § 121.035(2) (Banks-Baldwin 1996 Acts Issue). Third, plaintiffs alleged that § 121.190(1), which required identification of the sponsor on each paid political advertisement, violated plaintiffs' First Amendment right to anonymously publish their political views.[9] Ky. Rev. Stat. Ann. § 121.190(1) (Banks-Baldwin 1995), amended by Ky. Rev. Stat. Ann. § 121.190(1) (Banks-Baldwin 1996 Acts Issue). Fourth, plaintiffs alleged that §§ 121.150(6) and 121A.050(1), which limited to $500 the amount any individual or permanent committee could contribute to any one political candidate in any one election year, violated the Freedom of Association Clause by limiting plaintiffs' ability

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[8] Section 121.035(2) provided in relevant part:

> No officer, agent, attorney, or employee of any corporation . . . shall disburse, distribute, pay out, or in any way handle any money [or] funds . . . to be used or employed in any way for the purpose of aiding, assisting, or advancing any candidate for public office.

Ky. Rev. Stat. Ann. § 121.035(2) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.035(2) (Banks-Baldwin 1996 Acts Issue).

[9] Section 121.190(1) provided in relevant part:

> All newspaper or magazine advertising posters, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements with reference to or intended for, the support or defeat of a candidate, slate of candidates, or group of candidates for nomination or election to any public office shall be identified by the words "paid for by" followed by the name and address of the payer.

Ky. Rev. Stat. Ann. § 121.190(1) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.190(1) (Banks-Baldwin 1996 Acts Issue).

to fully ally themselves with candidates of their choice.[10] Ky. Rev. Stat. Ann. § 121A.050(1) (Banks-Baldwin 1995), amended by Ky. Rev. Stat. Ann. § 121A.050(1) (Banks-Baldwin 1996 Acts Issue). Fifth, plaintiffs alleged that § 121.150(10), which limited annual aggregate contributions by individuals to all permanent committees to $1,500, violated both the Free Speech and Freedom of Association

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[10] Section 121.150(6) provided, in relevant part, that:

> No candidate, campaign committee, political issues committee, nor anyone acting on their behalf, shall accept a contribution of more than five hundred dollars ($500) from any person, permanent committee, or contributing organization in any one (1) election. . . . No person, permanent committee, or contributing organization shall contribute more than five hundred dollars ($500) to any one (1) candidate, campaign committee, political issues committee, nor anyone acting on their behalf in any one (1) election.

Ky. Rev. Stat. Ann. § 121.150(6) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.150(6) (Banks-Baldwin 1996 Acts Issue).

Section 121A.050(1) provided, in relevant part, that:

> A slate of candidates . . . shall not knowingly accept a contribution from a natural person, permanent committee, executive committee of a political party, or contributing organization of more than five hundred dollars ($500) in any one (1) election. Except for independent expenditures, as defined in KRS 121.150(1), no natural person, permanent committee, executive committee of a political party, or contributing organization shall knowingly make a contribution of more than five hundred dollars ($500) in any one (1) election.

Ky. Rev. Stat. Ann. § 121A.050(1) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121A.050(1) (Banks-Baldwin 1996 Acts Issue).

Clauses.[11]Ky. Rev. Stat. Ann. § 121.150(10) (Banks-Baldwin 1995), amended by Ky. Rev. Stat. Ann. § 121.150(10) (Banks-Baldwin 1996 Acts Issue). Finally, plaintiffs alleged that § 121A.030(4), which effectively limited to $150,000 the aggregate amount a gubernatorial candidate could receive from all permanent committees combined in any one election year, violated plaintiffs' free speech and associational rights by limiting plaintiffs' direct contributions to candidates as well as plaintiffs' independent expenditures.[12]Ky. Rev. Stat. Ann. § 121A.030(4) (Banks-Baldwin 1995), amended by Ky. Rev. Stat. Ann. § 121A.030(4) (Banks-Baldwin 1996 Acts Issue).

The district court consolidated plaintiffs' request for preliminary injunctive relief with the State's request for summary judgment. The court dismissed plaintiffs' claims premised upon the definitions of contribution and permanent

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[11] Section 121.150(10) provided, in relevant part, that:

> No person shall contribute more than one thousand five hundred dollars ($1,500) to all permanent committees and contributing organizations in any one (1) year.

Ky. Rev. Stat. Ann. § 121.150(10) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121.150(10) (Banks-Baldwin 1996 Acts Issue).

[12] Section 121A.030(4) provided, in relevant part, that:

> A slate of candidates for Governor and Lieutenant Governor . . . may receive contributions from permanent committees which, in the aggregate, shall not exceed twenty-five percent (25%) of the qualifying contributions received by the slate of candidates in any one (1) election up to a maximum of one hundred fifty thousand dollars ($150,000) in any one (1) election.

Ky. Rev. Stat. Ann. § 121A.030(4) (Banks-Baldwin 1995), *amended by* Ky. Rev. Stat. Ann. § 121A.030(4) (Banks-Baldwin 1996 Acts Issue).

committee for failure to state a case or controversy because the Registry had never interpreted those definitions as broadly as plaintiffs' asserted.[13] It then dismissed plaintiffs' challenge to § 121.035(2), which prohibited corporate employees from various involvement in corporate campaign contributions, based upon the same rationale. The court rejected plaintiffs' standing argument that the allegedly overbroad definitions sufficiently "chilled" plaintiffs' exercise of their First Amendment rights because none of the challenged provisions had ever been enforced against plaintiffs, nor did the State have any intention of future enforcement. The district court then upheld the remaining provisions against plaintiffs' First Amendment challenges, concluding that each of these provisions was necessary to combat actual and perceived corruption in Kentucky politics.

D. Legislative Intervention

Plaintiffs appealed the district court decision to this Court. After plaintiffs filed their initial appellate brief, the Kentucky General Assembly amended the Act during its regular session. Gen. Ass. HB130, 1996, Reg. Sess. (Ky. 1996); Gen. Ass. HB 695, 1996, Reg. Sess. (Ky. 1996). These amendments directly affect many of plaintiffs' challenges.[14]

First, the Kentucky General Assembly amended § 121.015(3), explicitly narrowing the definition of "permanent committee" to encompass only those organizations which expressly advocate the election or defeat of clearly identified candidate(s).[15]Ky. Rev. Stat. Ann.

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[13] The specific claims dismissed upon this rationale were challenges to §§ 121.025 and 121.180(6)(a).

[14] In fact, many of the amendments appear to be in direct response to plaintiffs' suit.

[15] The amended version of § 121.015(3)(c) now reads, in pertinent part:

§ 121.015(3)(c) (Banks-Baldwin 1996 Acts Issue), as amended, (emphasis added). Second, the Assembly amended § 121.015(6), deleting the language upon which plaintiffs' relied to argue that the term "contribution" encompassed issue advocacy expenditures, as well as explicitly exempting independent expenditures from the definition.[16] Ky. Rev. Stat. Ann. § 121.015(7)(c) (Banks-Baldwin 1996 Acts Issue), as amended. Third, the Assembly amended § 121.035 to allow corporations to contribute funds in connection with issues of public importance and to allow non-profit corporations to make independent

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> Permanent committee . . . means a group of individuals, including an association, committee, or organization, other than a campaign committee, political issues committee, inaugural committee, or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose *expressly advocating the election or defeat of one (1) or more clearly identified candidates, slate of candidates, or political parties, which functions on a regular basis throughout the year.*

Ky. Rev. Stat. Ann. § 121.015(3)(c) (Banks-Baldwin 1996 Acts Issue), *amended by,* (emphasis added).

[16] The amended version of § 121.015(6)(e), now at § 121.015(7)(c), reads, in pertinent part:

> Notwithstanding the foregoing meanings of 'contribution', the word shall not be construed to include:
>
> (c) An independent expenditure by any individual or permanent committee.

Ky. Rev. Stat. Ann. § 121.015(7)(c) (Banks-Baldwin 1996 Acts Issue), *as amended.*

expenditures.[17]Ky. Rev. Stat. Ann. § 121.035(3) (Banks-Baldwin 1996 Acts Issue), as amended. Fourth, the Assembly amended § 121.190(1) to require sponsor identification upon independent expenditures, but not issue advocacy expenditures.[18]Ky. Rev. Stat. Ann. § 121.190(1) (Banks-Baldwin 1996 Acts Issue), as amended, (emphasis added). Finally, the Assembly raised the dollar limitations on contributions by individuals and permanent committees to political candidates contained in §§ 121.150(6) and 121A.050(1) from $500 to $1,000.[19]Ky. Rev. Stat. Ann.

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[17] The amended version of § 121.035 now reads, in pertinent part:

> Nothing in this section shall be construed to prohibit a corporation from making contributions in support of a constitutional amendment, a public question which appears on the ballot, or position on an issue of public importance. Nothing in this chapter shall be construed to prohibit a not-for-profit corporation, which does not derive a substantial portion of its revenue from for-profit corporations, from making independent expenditures.

Ky. Rev. Stat. Ann. § 121.035(3) (Banks-Baldwin 1996 Acts Issue), *as amended*..

[18] The amended version of § 121.190(1) reads, in pertinent part:

> All newspaper or magazine advertising posters, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements *which expressly advocate the election or defeat of a clearly identified candidate, slate of candidates, or group of candidates* . . . shall be identified by the words "paid for by" followed by the name and address of the individual or committee which paid for the communication.

Ky. Rev. Stat. Ann. § 121.190(1) (Banks-Baldwin 1996 Acts Issue), *as amended.*, (emphasis added).

[19] The amended version of § 121.150(6) reads, in pertinent part:

§ 121A.050(1) (Banks-Baldwin 1996 Acts Issue), as amended.

Keeping this extensive framework in mind, we now turn to the merits of plaintiffs' appeal.

II. Discussion

We review the district court's grant of summary judgment in favor of the State of Kentucky de novo. *Kentry v. Bank One*, 92 F.3d 384, 389 (6th Cir. 1996).

> No candidate, campaign committee, political issues committee, nor anyone acting on their behalf, shall accept a contribution of more than one thousand dollars ($1,000) from any person, permanent committee, or contributing organization in any one (1) election. . . . No person, permanent committee, or contributing organization shall contribute more than one thousand dollars ($1,000) to any one (1) candidate, campaign committee, political issues committee, nor anyone acting on their behalf in any one (1) election.

Ky. Rev. Stat. Ann. § 121.150(6) (Banks-Baldwin 1996 Acts Issue), *as amended.*

The amended version of § 121A.050(1) reads, in pertinent part:

> A slate of candidates . . . shall not knowingly accept a contribution from a natural person, permanent committee, executive committee of a political party, or contributing organization of more than one thousand dollars ($1,000) in any one (1) election. Except for independent expenditures, as defined in KRS 121.150(1), no natural person, permanent committee, executive committee of a political party, or contributing organization shall knowingly make a contribution of more than one thousand dollars ($1,000) in any one (1) election.

Ky. Rev. Stat. Ann. § 121A.050(1) (Banks-Baldwin 1996 Acts Issue), *as amended.*.

A. Mootness Issue

The State contends that the recent statutory amendments effectively moot various challenges brought by plaintiffs in the district court. First, the State asserts that the amendments explicitly excluding independent expenditures and issue advocacy expenses from the definition of contribution moot plaintiffs' challenge to § 121.025. Second, the State asserts that the amendments which allow corporations to contribute funds in connection with issues of public importance and to allow non-profit corporations to make independent expenditures moot plaintiffs' challenge to § 121.035. Third, the State asserts that the amendments narrowing the definition of permanent committee to encompass only those organizations which expressly advocate the election or defeat of clearly identified candidate(s) moot plaintiffs' challenge to § 121.080(6). Finally, the State asserts that the amendments to § 121.190(1) requiring sponsor identification upon independent expenditures, but not issue advocacy expenditures, moot plaintiffs' challenge to that section to the extent it is based upon the statute's application to issue advocacy expenditures. Plaintiffs respond that all claims are still properly before this Court because the Kentucky General Assembly remains free to reenact the prior statutory scheme.[20]

Article III of the Constitution confines the power of the federal courts to adjudication of "cases" or "controversies". U.S. Const. art. III, § 2. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The mootness doctrine, a subset of the Article III justiciability requirements, demands a live case-or-controversy when a federal court decides a case. *Burke v. Barnes*, 479 U.S. 361, 363 (1987). Legislative

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[20] Neither party disputes that plaintiffs' remaining challenges to §§ 121.025, 121.190(1), 121.150(6), 121A.050(1), 121.150(10) and 121A.030(4) are properly before this Court.

repeal or amendment of a challenged statute while a case is pending on appeal usually eliminates this requisite case-or-controversy because a statute must be analyzed by the appellate court in its present form. *See, e.g., Kremens v. Bartley*, 431 U.S. 119, 129 (1977); *Hall v. Beals*, 396 U.S. 45, 48 (1969). Applying this principle in the First Amendment context, the Supreme Court has routinely declared moot those claims effectively nullified by statutory amendment pending appeal. *Massachusetts v. Oakes*, 491 U.S. 576, 582-84 (1989); *Bigelow v. Virginia*, 421 U.S. 809, 817-18 (1975). Both *Oakes* and *Bigelow* involved First Amendment overbreadth challenges implicit as defenses to criminal prosecution. In each case, the Court refused to reach the First Amendment arguments because legislative amendment of the challenged statute while the case was pending rendered the issue moot. *See Bigelow*, 421 U.S. at 817-18; *Oakes*, 491 U.S. at 583-84. The plurality in *Oakes* emphasized that Bigelow "stands for the proposition that overbreadth analysis is inappropriate if the statute being challenged has been amended or repealed." *Oakes*, 491 U.S. at 582. Accordingly, overbreadth challenges to statutes become moot when the challenged language is effectively nullified by subsequent statutory amendment.

We agree with the State that under *Bigelow* and *Oakes* plaintiffs' challenges to §§ 121.025, 121.180(6)(a), 121.035(2), and 121.190(1) must be dismissed as moot to the extent those challenges are effectively nullified by the recent statutory amendments. This conclusion results in dismissal on appeal of plaintiffs' challenges to §§ 121.180(6)(a) and 121.035(2) in their entirety. In addition, plaintiffs' challenges to § 121.025 premised upon that section's alleged limitation of independent expenditure and issue advocacy expenses are also moot. Finally, plaintiffs' challenge to § 121.190(1) has likewise been mooted to the extent plaintiffs challenge the statute's application to issue advocacy expenses.

Plaintiffs' attempt to analogize the case at bar to *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289-90 (1983) fails. In *Aladdin's Castle*, the district court declared unconstitutional an ordinance passed by the City of Mesquite. *Id.* at 285-89. The City then repealed the ordinance before the case reached the Supreme Court. *Id.* at 287-88. The Supreme Court held that the City's repeal of the ordinance did not moot the appeal because it "would not preclude [the City] from reenacting precisely the same provision if the District Court's judgment were vacated." *Id.* at 289. Critical to the Court's decision, however, was the City's announced intention to reenact the unconstitutional ordinance if the case was dismissed as moot.[21] *Aladdin's Castle*, 455 U.S. at 289-90. This essential fact, which created the case-or-controversy before the Supreme Court in *Aladdin's Castle*, is absent from plaintiffs' case.

Aladdin's Castle can best be characterized as an example of the "voluntary cessation" exception to the general rule that legislative repeal of a statute renders a case moot. See Erwin Chemerinsky, *Federal Jurisdiction* 136 (1994) (case should not be considered moot under voluntary cessation exception to the mootness doctrine "if the defendant voluntarily ceases the allegedly improper behavior but is free to return to it at any time"). This exception properly applies only when a recalcitrant legislature clearly intends to reenact the challenged regulation. The record before us is devoid of any expressed intention by the Kentucky General Assembly to reenact the prior legislative scheme. In fact, the state's prior conduct points toward the

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[21] The established practice for dealing with a case which has become moot on appeal is to vacate the judgment below. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). In *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1983), this remedy would have resulted in vacation of the district court's decision declaring the ordinance unconstitutional, opening the door for the City to reenact the original ordinance. 455 U.S. at 289.

opposite conclusion. For over twenty years, the State has not enforced against plaintiffs the challenged portions of the Act. The amended Act now makes this enforcement policy explicit. Gen. Ass. HB130, 1996, Reg. Sess. (Ky. 1996), *amending* Ky. Rev. Stat. Ann. § 121.010, *et seq*. Given these amendments, "there is no possibility now that the statute's pre-[1996] form will be applied . . . to appellant or will chill the rights of others." *Bigelow*, 421 U.S. at 817-18. *Aladdin's Castle* is inapposite, and plaintiffs' challenges to §§ 121.025, 121.180(6)(a), 121.035(2), and 121.190(1) effectively nullified by the statutory amendments are dismissed as moot.

B. Plaintiffs' Remaining Challenges

1. Prohibition on Direct Corporate Contributions to Candidates

Plaintiffs' remaining challenge to § 121.025 contends that the statute unconstitutionally prohibits nonprofit corporations from making direct contributions to candidates for political office. Plaintiffs argue that unlike for-profit corporations, which may be prohibited from making direct contributions to candidates for public office, nonprofit corporations simply do not present a significant threat of corrupting the political process.

The Supreme Court addressed the issue of limiting direct corporate contributions to candidates in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982) [hereinafter *NRWC*]. In *NRWC*, the Court upheld federal restrictions upon corporate solicitation of campaign funds from individuals. *Id*. Although the general purpose of the challenged statute in *NRWC* was to "prohibit contributions or expenditures by corporations . . . in connection with federal elections," the statute permitted corporations to make limited campaign contributions from separate segregated funds solicited explicitly for that

purpose. *Id.* at 201-02. In upholding the statute, the Court implicitly concluded that Congress could prohibit direct contributions by corporations to candidates for public office. *See Federal Election Comm'n v. Nat'l Conservative PAC*, 470 U.S. 480, 495 (1985) (noting that *NRWC* upheld "the prohibition of corporate campaign contributions to political candidates").

Plaintiffs argue that the reasoning underlying *NRWC* does not apply to nonprofit corporations like KRL because nonprofit corporations do not have the resources to amass the political "war chests" which spurred Congress to enact the statute at issue in *NRWC*. In *NRWC*, the Court recognized that this ability to amass great financial resources is irrelevant to Congress's authority to enact broad legislation limiting direct contributions by corporations to political candidates. *Id.* at 209-10 (the statute "restricts . . . corporations and labor unions without great financial resources, as well as those more fortunately situated"). In addressing the constitutionality of these federal restrictions on corporate campaign solicitation, the Supreme Court noted Congress's "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* Although the Court did not explicitly note the distinction between nonprofit and for-profit corporations, the majority rejected a nonprofit corporation's challenge to the restrictions. *Id.* at 199. The Court deferred to Congress's determination that the potential for influence over the political process demanded regulation. *Id.* at 210. Despite the statute's broad application, the Court refused to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.*

Plaintiffs' reliance upon *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) [hereinafter *MCFL*], to create a meaningful distinction between for-profit and nonprofit corporations is similarly misplaced. Although the Court in *MCFL*

recognized a distinction between these two corporate forms in analyzing the constitutionality of campaign finance regulation, that case dealt specifically with the issue of limiting independent expenditures by corporations, not direct contributions by corporations. *MCFL*, 479 U.S. at 251. The majority in *MCFL* distinguished the holding of *NRWC* by noting that while the statute in *NRWC* applied to both for-profit and nonprofit corporations, that statute only addressed the issue of direct contribution limitations, not independent expenditures. *MCFL*, 479 U.S. at 259. In justifying the holding in *NRWC*, the Court in *MCFL* stated, "We have consistently held that restrictions on [direct] contributions require less compelling justification than restrictions on independent spending." *Id.* at 259-60. Therefore, although the Court in *MCFL* distinguished between nonprofit and for-profit corporations with respect to independent expenditures, it reiterated the *NRWC* conclusion that a legislature may restrict direct contributions to political candidates from both for-profit and nonprofit corporations in order to limit the potential for corruption commensurate with those contributions. *Id.* Consequently, plaintiffs' distinction between nonprofit and for-profit corporations simply does not apply to regulation of direct corporate contributions.

In sum, we believe that the reasoning of *NRWC* applies directly to plaintiffs' challenge to § 121.025. In both *NRWC* and the case at bar, the goal of the legislature is to reduce actual and perceived corruption in the political process. Because the Supreme Court upheld broad federal prohibitions against direct corporate contributions as constitutionally permissible to limit potential corruption, we likewise uphold the Kentucky General Assembly's restrictions. We reject plaintiffs' contention that § 121.025 unconstitutionally prohibits nonprofit corporations from making direct contributions to candidates for political office.

2. Identification Disclaimer

Also remaining following legislative amendment is plaintiffs' challenge to § 121.190(1). Plaintiffs allege that this statute infringes plaintiffs' First Amendment right to "publish anonymously" by requiring identification of the sponsor to be placed upon every independent expenditure.

Two Supreme Court cases, *Buckley v. Valeo*, 424 U.S. 1 (1976) and *McIntyre v. Ohio Election Commission*, 115 S.Ct. 1511 (1995), provide the parameters for our analysis of this issue.

In *Buckley*, the seminal decision on campaign regulation, the plaintiffs brought First Amendment challenges to various provisions of the Federal Election Campaign Act of 1971. These provisions required federal campaign contributors to report their direct candidate contributions, as well as any independent expenditures, to the Federal Election Commission. *Buckley*, 424 U.S. at 63-64. Using a strict scrutiny analysis, the Supreme Court permitted these restrictions upon plaintiffs' First Amendment rights because they were narrowly tailored to directly serve three substantial governmental interests: 1) notifying the public of the source of campaign funds; 2) preventing actual and perceived corruption in the political process; and 3) creating a recordkeeping method to detect violations of the Campaign Act's contribution limitations. *Id.* at 64-68. The Court balanced these interests against the free exercise of First Amendment rights and concluded that the reporting requirements were constitutional because they were narrowly tailored to further these interests. The Court's approach in *Buckley* provides the constitutional framework for analyzing First Amendment challenges to campaign contribution regulations.

At the other end of the spectrum is the more recent case of *McIntyre v. Ohio Election Commission*, 115 S.Ct. 1511 (1995), which addressed the specific issue of the constitutionality of mandatory identification disclaimers. At

issue in *McIntyre* was an Ohio ordinance requiring mandatory identification disclaimers on issue advocacy expenditures. *Id.* at 1514. The Court noted that the mandatory reporting requirements upheld in *Buckley*, while certainly an intrusion on First Amendment rights, reveal far less information than the mandatory identification disclaimers *sub judice*. *Id.* at 1523. Furthermore, in contrast to the independent expenditure regulations addressed in *Buckley*, the *McIntyre* Court found that the public's concern with preventing corruption was greatly diminished in the context of issue advocacy expenditures. *Id.* at 1523-24. Based upon these factors, the Court struck down the ordinance.[22] Of particular relevance to this case, the *McIntyre* majority highlighted the significant possibility of corruption commensurate with independent expenditures and recognized that the potential for corruption associated with issue advocacy expenditures is significantly lower because issue advocacy expenditures do not directly support political candidates.[23] *Id.* Accordingly, the government's interest in limiting political corruption is stronger when independent

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22 Although the statute in *McIntyre* applied to both issue advocacy expenses and independent expenditures, *McIntyre* ruled only on an issue advocacy advertisement. As Justice Ginsburg's concurrence noted, the majority decided not to address the ordinance's application to independent expenditures, but rather chose to "leav[e] open matters not presented by [issue advocacy advertisements]." *Id.* at 1524.

23 The Court hinted at possible approval of identification disclaimers on independent expenditures by noting that "*Buckley* may permit a more narrowly drawn statute" than the Ohio ordinance, which covered both issue advocacy expenditures and independent expenditures. *McIntyre*, 115 S. Ct. at 1524. Furthermore, in her concurrence Justice Ginsburg stated that "a State's interest in protecting an election process might justify a more limited identification requirement." *Id.* at 1524 (Ginsburg, J., concurring) (*quoting* majority opinion at 1522). Presumably, these references to a 'more limited identification requirement' point to a statute like the one in the case at bar, which requires identification disclaimers only on independent expenditures.

expenditures, as opposed to issue advocacy expenditures, are regulated.

The challenges presented in *Buckley* and *McIntyre* can best be characterized as two points on a continuum, with plaintiffs' challenge falling somewhere between them. *Buckley* balanced substantial government interests in combatting corruption in the political process against the First Amendment infringement of reporting requirements and concluded that those interests outweighed the limited infringement. *McIntyre* then applied the reasoning of *Buckley* and concluded that the additional First Amendment burdens exacted by requiring identification disclaimers on issue advocacy expenditures outweighed the state's more limited interest in identifying proponents of issue advocacy.

Like *Buckley*, Kentucky's substantial interests in notifying the public of the source of campaign expenditures, along with preventing actual and perceived corruption in the political process, are clearly implicated. Like *McIntyre*, the disclaimer provision at issue in this case places a more onerous burden on plaintiffs than the reporting requirements analyzed in *Buckley*.

The identification disclaimer requirement in § 121.190(1) clearly implicates First Amendment protection because it burdens core political speech. *McIntyre*, 115 S.Ct. at 1518-19. When a statute burdens First Amendment rights, it must be "narrowly tailored to serve an overriding state interest." *Id.* at 1519. The State asserts that § 121.190(1) prevents actual and perceived corruption by immediately notifying the public of any possible allegiance a particular candidate may feel toward the publisher. The State also asserts that it provides the Registry with a method of detecting those expenditures which are not truly independent by providing a paper trail to detect violations by unscrupulous PACs routing expenditures through individuals. Under *Buckley*, these are both substantial governmental interests. *Buckley*, 424 U.S. at 66-68. Applying the analysis of *Buckley*, we believe the

identification disclaimer for independent expenditures contained in § 121.190(1) is narrowly tailored toward achieving those goals. Therefore, plaintiffs' First Amendment challenge to § 121.190(1) is rejected.

3. Dollar Limitation Upon Direct Contributions

Plaintiffs also challenge §§ 121.150(6) and 121A.050(1) of the Act, which effectively limit to $1,000 the amount any individual or permanent committee can contribute to any one political candidate in any one election year, alleging that these provisions violate the Freedom of Association Clause by limiting plaintiffs' ability to fully ally themselves with candidates of their choice.

In *Buckley*, the Supreme Court upheld a nearly identical $1,000 limitation on direct contributions in the context of federal elections. *Buckley*, 424 U.S. at 23-35. In doing so, the Court stressed that the judiciary should not take out a scalpel to probe dollar limitations because "distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30. We believe that the Act's $1,000 limitation on direct contributions in connection with local and state elections in Kentucky is not different in kind from the $1,000 limitation on direct contributions in connection with federal elections upheld in *Buckley*. Therefore, we uphold the $1,000 limitations against plaintiffs' First Amendment challenge.[24]

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[24] We also note that plaintiffs' attorney, when addressing the constitutionality of the $500 limitations in the district court, suggested that a $1,000 limitation would be appropriate. Plaintiffs' attorney reiterated this view when he essentially conceded at oral argument that the $1,000 limitation on contributions is constitutional under *Buckley*.

4. Dollar Limitation Upon Aggregate Contributions

Plaintiffs also challenge § 121.150(10), which limits to $1,500 the aggregate contributions by an individual to all permanent committees within a one year period. Plaintiffs allege that this provision violates both the Free Speech and Freedom of Association Clauses of the First Amendment.

Section 121.150(10) does not limit direct contributions to candidates or independent expenditures to support candidates. Rather, it only limits aggregate contributions to permanent committees, which generally have full discretion to disburse the funds in any manner. Plaintiffs' challenge, therefore, involves what the Supreme Court has characterized as "speech by proxy" because the actual expenditure is made by the permanent committee, not the individual. *California Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981). The Court has clearly stated that this type of political speech, while not entirely unprotected by the First Amendment, does not receive the full First Amendment protection afforded direct political contributions because limitations on contributions to permanent committees do not significantly infringe First Amendment rights. *Id.* at 196-97.

In addition to the limited protection afforded this type of speech, the $1,500 aggregate limit furthers the Act's statutory scheme by preventing evasion of the $1,000 limit upon direct individual contributions to candidates. Absent this aggregate limit, unscrupulous individuals could pass unlimited amounts of cash to permanent committees with the understanding that those funds would be disbursed directly to specific candidates. *See Buckley*, 424 U.S. at 38 (noting possibility of evasion in upholding similar $25,000 limitation in the context of federal elections). In that sense, the limitation is integral to the effectiveness of the overall statutory scheme of combatting corruption in the political process. *See id. See also Calif. Med. Ass'n.*, 453 U.S. at 198-199.

Furthermore, we do not sit as a super-legislature to second guess the Kentucky General Assembly as to the size of the aggregate limit. *See Buckley*, 424 U.S. at 30 (judiciary should not dissect dollar limitations unless "distinctions in degree become . . . differences in kind.") Local and state elections in Kentucky simply do not involve the enormous financial contributions generally associated with federal elections. Consequently, a relatively small contribution to a local Kentucky campaign may create a substantial likelihood of corruption. Recognizing these inherent differences between federal and local election expenditures, we believe the $1,500 limit for Kentucky state and local elections does not amount to a difference in kind from the $25,000 limit upheld in *Buckley* in the context of federal elections. It is enough to note that the $1,500 limit furthers the goal of preventing corruption in Kentucky politics by avoiding evasion of the individual contribution limitations. This goal of combatting corruption, combined with the limited protection afforded this type of speech, compels the conclusion that § 121.150(10) is constitutional.

We also note plaintiffs' challenge to the Act's disparate treatment between aggregate contributions to permanent committees and aggregate contributions to candidates. As noted previously, the Act limits to $1,500 the amount an individual may contribute to all permanent committees in any one election year. It does not, however, place a similar aggregate limitation upon the amount of cash an individual may contribute to all political candidates in that same year. As a result, the Act treats permanent committees and political candidates differently with respect to aggregate contribution limits.

Nevertheless, the Act's distinction between permanent committees and political candidates does not render it unconstitutional. The Supreme court rejected a similar argument in *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981), finding no evidence of actionable discrimination in a similar statute

because the disparate treatment between individuals and permanent committees "reflect[ed] a judgment by [the legislature] that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." *Id.* at 201. The disparate treatment under Kentucky's Campaign Finance Law reflects an analogous legislative determination that aggregate limitations are necessary to prevent manipulation of permanent committees in order to evade the Act's $1,000 limitation on direct contributions to any one political candidate. The Kentucky General Assembly chose not to enact a similar aggregate limitation for political candidates, perhaps because the Assembly viewed it as unnecessary given this $1,000 limitation. Regardless of the Assembly's rationale, the disparate treatment which plaintiffs allege simply does not rise to the level of rendering the statute unconstitutional.

5. Dollar Limitation Upon Gubernatorial Candidates

Finally, plaintiffs challenge § 121A.030(4), which effectively limits to $150,000 the aggregate amount a gubernatorial candidate may receive from all permanent committees combined in any one election year.[25] This

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[25] This $150,000 aggregate limit is reached differently depending upon whether or not the candidate receives disbursements from Kentucky's Election Campaign Fund (the "Fund"). For those individuals who choose not to receive disbursements from the Fund, the statutory limit is explicitly set at $150,000. Ky. Rev. Stat. Ann. § 121A.030(4) (Banks-Baldwin 1996 Acts Issue). In contrast, those candidates who receive disbursements from the Fund are limited by interrelated provisions. Those candidates are entitled to receive two dollars from the Fund for every dollar they raise in political contributions, *up to a total of $600,000 raised*. Ky. Rev. Stat. Ann. § 121A.060(2)(c) (Banks-Baldwin 1996 Acts Issue) (emphasis added). Aggregating this $600,000 of raised political contributions with the $1,200,000 disbursement received from the Fund (two dollars for each dollar raised) yields a total of $1,800,000 available to the candidate. This total provides the maximum amount a candidate who receives disbursements from the Fund can expend for campaign

$1,800,000 budget still includes only $600,000 of political contributions raised independently by the candidate. Of that $600,000, only 25% may be received from permanent committees. Ky. Rev. Stat. Ann. § 121A.030(4) (Banks-Baldwin 1996 Acts Issue). That equates to an effective limit of $150,000 on the amount a gubernatorial candidate receiving disbursements from the Fund may accept from permanent committees in any one election year. Therefore, whether or not a candidate receives disbursements from the Fund, that candidate is limited to receiving a total of $150,000 from all permanent committees combined. Plaintiffs claim this statute violates their free speech and associational rights by limiting plaintiffs' direct contributions to candidates.[26]

Again, statutes which infringe upon First Amendment freedoms must be narrowly tailored to further substantial government interests. *Buckley*, 424 U.S. at 64-68. However, when core First Amendment rights are not significantly affected, the regulated speech is not entitled to full First Amendment protection. *California Med. Ass'n.*, 453 U.S. at 196. Section 121A.030(4) will seldom infringe upon First Amendment freedoms because it will rarely restrict contributions by permanent committees to gubernatorial

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purposes in any one election year. Ky. Rev. Stat. Ann. § 121A.030(1) (Banks-Baldwin 1996 Acts Issue).

[26] Section 121A.030(4) only applies to permanent committees. The recent statutory amendments clarified that KRL is not a permanent committee, nor is Mr. Zoeller. Therefore, plaintiffs' challenge to § 121A.030(4) is moot with respect to those two plaintiffs. However, because KRLPAC remains a permanent committee following the statutory amendments, we still must address plaintiffs' challenge.

In addition, plaintiffs' contention that § 121A.030(4) limits the dollar value of independent expenditures a gubernatorial candidate may "receive" from permanent committees has been mooted by the amendments clarifying that independent expenditures are not included within the statutory definition of contribution.

candidates. Regardless of the limitations in § 121A.030(4), the Act still limits to $1,000 the amount a permanent committee can contribute directly to a candidate in any one election year. Ky. Rev. Stat. Ann. § 121.150(6) (Banks-Baldwin 1996 Acts Issue). Assuming that a gubernatorial candidate raises a total of $600,000 in direct political contributions, up to $150,000 of that money may come directly from permanent committees. If each permanent committee contributes the statutory maximum of $1,000, this corresponds to a total of one-hundred and fifty different permanent committees with the ability to contribute to that candidate. Therefore, the $150,000 limitation contained in § 121A.030(4) would only apply to the one-hundred and fifty-first permanent committee that wishes to contribute to that candidate. Given this unlikely scenario,[27] this limitation upon plaintiffs' First Amendment rights is nearly imperceptible.

Furthermore, § 121A.030(4) attempts to eliminate perceived corruption in the political process by limiting the total amount of funds gubernatorial candidates may accept from groups with vested interests.[28] The Supreme Court has consistently held that preventing perceived corruption is a compelling state interest. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990) (*citing NCPAC*, 470 U.S. at 496-97). Legislatures must constantly regulate vested interests that have the ability to amass large political war chests. *See NRWC*, 459 U.S. at 207 (acknowledging Congress's authority to regulate corporate political

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[27] The district court noted that nothing in the record indicates that the provision has limited PAC contributions in the past or is likely to do so in the future.

[28] In contrast, the direct contribution limits in the Act attempt to combat actual corruption by eliminating the "financial quid pro quo: dollars for political favors." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985) [hereinafter *NCPAC*].

expenditures). Recognizing this problem, the Supreme Court has upheld dollar limitations upon direct contributions by PAC's to political candidates. *See Buckley*, 424 U.S. at 23-35. Section 121A.030(4)'s limitations upon gubernatorial candidates' receipt of funds from permanent committees merely represents the flipside of this same issue. Given that the direct contribution limits in *Buckley* withstood strict scrutiny, we hold that the contribution limit at issue here also survives First Amendment challenge. The minimal speech restriction placed upon permanent committees by § 121A.030(4), combined with the state's compelling interest in combatting perceived corruption justifies this limited infringement upon First Amendment rights. Consequently, plaintiffs' challenge to § 121A.030(4) is rejected.

III. Conclusion

Plaintiffs' claims that are effectively nullified by the statutory amendments are moot. Plaintiffs' remaining challenges are rejected on their individual merits. In summary, the provisions at issue in this case all survive plaintiffs' First Amendment challenges. Therefore, the decision of the district court is **affirmed**.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

NO. 3:95CV-582H

KENTUCKY RIGHT TO LIFE, INC. et al.
PLAINTIFFS

v.

DAVID STENGAL, et al.
DEFENDANTS

MEMORANDUM OPINION

ENTERED AUGUST 1, 1997

This case is before the court of Plaintiffs' motion for attorney's fees. The Court previously dismissed the majority of Plaintiffs' claims challenging the constitutionality of a number of Kentucky election laws. The only statutory provision the Court found violative of the First Amendment was KRS 121.180 (6)(b) which required all permanent committees to pay an "administrative fee" equal to 5 percent of the contributions it received. Plaintiffs appealed this decision and the Sixth Circuit affirmed it.

Prior the Sixth Circuit's decision to affirm, the Kentucky legislature amended a number of the challenged provisions. Plaintiffs claim that the legislature took this action in direct response to their lawsuit. Plaintiffs argue that since their lawsuit was the catalyst for the amendments, they should be considered a "prevailing party" in this lawsuit and receive attorney's fees pursuant to 42 U.S.C. § 1988. The Court will first address the question of whether Plaintiffs should receive any attorney's fees at all and if it finds that they should, it will determine the amount.

The question of whether Plaintiffs should receive any attorney's fees at all presents two separate issues: (1) should Plaintiffs be considered a "prevailing party" for the portion of the claim which was decided against them since the legislature amended the provision which Plaintiffs challenged in their lawsuit; and (2) should Plaintiffs receive any attorney's fees for the portion of the claim on which they prevailed. Based upon the analysis that follows, the Court answers the first question "no" and the second one "yes."

A.

Only a "prevailing party" to a lawsuit may collect attorney's fees from the opposing party. *See* 42 U.S.C. § 1988(b). A party may be considered "prevailing" even if it does not win on the merits of its case. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987). If a lawsuit leads to some voluntary action or inaction by the defendant that affords the plaintiff "all or some of the relief he sought through a judgement," the plaintiff if deemed to have "prevailed." *Id.* at 760-61.

The Supreme Court has set forth a specific test for determining whether a party has "prevailed" in its lawsuit:

> [A] plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

See Farrar v. Hobby, 506 U.S. 103, 111-12 (1992). That is, Defendant must act (or cease to act) in the manner the plaintiffs sought in bringing the action.

In this case, Plaintiffs sought a declaration that the challenged provisions were unconstitutional and an injunction to prevent their enforcement. This Court found that the challenged provisions, with the exception of KRS

121.180(6)(b), had been enforced in a constitutional manner.[1] The amendments to the provisions did not change the manner in which Defendants enforced the provisions, rather it clarified the statutory language to make it consistent with its past enforcement. As a result, the amendments did not alter Defendant's enforcement of Kentucky's election laws; the legislative action did not "materially alter" Defendants' behavior toward Plaintiffs.

The Supreme Court held similarly in *Texas State Teachers Assoc. v. Garland Ind. Sch. Dist.*:

> [If] the District Court found that the requirement that nonschool hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague...[but] there was "no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours[,]" we think it clear that this alone would not have rendered them "prevailing parties" within the meaning of § 1988.

489 U.S. 782, 792 (1989).

Plaintiffs' primary argument is that they sued the statutes for what they said, rather than the Defendants for what they did. As a result, Plaintiffs claim, the relevant relationship is that between Plaintiffs and the statutes, not between Plaintiffs and Defendants. However, the Supreme Court specifically addressed the issue of when attorney's fees should be awarded in declaratory judgment actions and concluded that, as with an action enjoining the defendant's behavior, it is the defendant's conduct which is key:

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[1]This opinion will deal with attorney's fees regarding KRS 121.180(6)(b) when it deals with the second issue.

> Likewise in a declaratory judgment action: if the defendant, under pressure of the lawsuit alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed.

Hewitt, 482 U.S. at 761. Even if a court declares a statute unconstitutional, the plaintiff is not a prevailing party unless that declaration alters the defendant's behavior towards the plaintiff. *See id.* Since the amendments at issue in this case will not alter Defendants' behavior towards Plaintiffs, the Court cannot conclude that Plaintiffs are a prevailing party under § 1988. As a result, they should not be awarded attorney's fees.

B.

With regard to KRS 121.180(6)(b), which was declared unconstitutional by this Court, Defendants' conduct has clearly been altered. The Court's order prohibited enforcement of that statute, which had been enforced in the past. In addition, the amendments eliminated this fee, preventing its future imposition.

The touchstone of the "prevailing party" inquiry regarding KRS 121.180(6)(b) is whether the benefit Plaintiffs achieved in the alteration of Defendants' conduct was significant enough to merit an attorney's fees award. According to the Supreme Court in *Garland*, any party who succeeds on any "significant issue" that materially alters the legal relationship between the parties is a prevailing party for fees purposes even if the issue was not the central issue in the case. *Garland*, 489 U.S. 791-92. As the *Garland* Court noted, "the degree of the plaintiff's success in relation to the other goals of he lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all." *Garland*, 489 U.S. at 790. According to the Sixth Circuit:

> If the plaintiff has succeeded on "any significant issue in litigation which achive[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind.

Sutton v. Cleveland Board of Educ., 958 F.2d 1339, 1352 (6th Cir. 1992) (citation omitted). Plaintiff challenged the "administrative fee" provision, among others, and sought to enjoin the enforcement of that provision. This Court agreed with Plaintiffs' analysis of the provision and prohibited its enforcement. To be sure, this claim was only one of several. It was probably the least important. Plaintiffs placed relatively little emphasis on it. However, these facts do not disqualify Plaintiffs as a "prevailing party" for § 1988 purposes. The Court does not find Plaintiffs to be a "prevailing party" as to the KRS 121.180(6) issue and, as such, merit an award of attorney's fees under § 1988. The Court will now assess the amount of attorney's fees to be awarded for Plaintiffs' successful claim.

II.

In *Hensley v. Eckerhart*, the Supreme Court laid out the proper method district courts should use in assessing attorney's fees. 461 U.S. 424 (1983). First, the district court should determine fees in terms of (hours worked) x (billing rate). *Id.* at 433. This amount is called the "lodestar figure." This figure should be based on (1) the number of hours an attorney would reasonable bill to its clients and (2) hourly fees based on prevailing market rates. *Id.* The standard for the latter is whether the fees are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). The burden to produce evidence--in addition to attorney's own

affidavits--supporting this standard is on the fee applicant. *Id.*

According to *Hensley*, the district court should begin with the lodestar figure. *Hensley*, 461 U.S. at 433 (explaining that the lodestar figure is presumed to be the reasonable fee). Only then should the district court consider adjusting the figure up or down. *Hensley*, 461 U.S. at 434. It may do so by considering the following factors:

(1) The time and labor required
(2) The novelty and difficulty of the questions
(3) The skill necessary to do the legal work well
(4) The preclusion of other employment by the attorney because of work on the case
(5) The customary fee
(6) Whether the fee is fixed or contingent
(7) Time limitations
(8) The amount involved and the results obtained
(9) The experience, reputation, and ability of the attorney
(10) The "undesirability" of the case
(11) The nature and length of the professional relationship w/the client
(12) Awards in similar cases

Hensley v. Eckerhart, 461 U.S. 424, 430 n.3 (1983).

The Court, in its discretion, could refuse an entire fee request if the amount requested "shocks the conscience,"[2] or if the party unnecessarily increased the complexity of he case *Henry v. Webermeier*, 738 F.2d 188, 195 (7th Cir. 1984). The Court may disagree with the number of hours claimed; however, the number of hours claimed does not rise to the level of "shocking" the Court's conscience. The request is not outrageous.

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[2] *Fair Housing Council v. Landlow*, 999 F.2d 92, 96 (4th Cir. 1993).

Regarding the second factor, Plaintiffs rightfully pursued their successful claim in good faith, since they were not required to exhaust administrative channels. Although legitimate questions might be raised as to the necessity of Plaintiffs litigating the other six unsuccessful claims,[3] this does not affect their right to receive attorney's fees on their legitimate claim.[4] Since Plaintiffs are entitled to some attorney's fees for their successful claim, the Court must determine the hours reasonably expended in pursuit of it.

To make this determination, "billing judgment' provides the standard to reduce the hours within each category. The district court should exclude hours that are excessive, redundant or unnecessary. *Hensley*, 461, U.S. at 434 (explaining that the hours should reasonably reflect sound legal judgment). After reviewing Plaintiffs' fee position, the Court concludes that they allocated their hours appropriately and it will not second guess them.

Plaintiffs identifies only a few hours attributable exclusively to their successful claim. For these few hours, the Court will allow full reimbursement. Some hours are specifically attributable to the unsuccessful claims. The Court will disregard these for all purposes. Naturally, Plaintiffs are entitled to reimbursement for some portion of the general time necessary to prosecute the case. This is a difficult and imprecise determination, particularly in this case, where the unsuccessful claims far outweigh the successful ones in complexity.

The Sixth Circuit has held that only where the district court cannot properly attribute hours to separate claims, should it reduce the total amount requested proportionately,

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[3] According to Defendants, a state advisory opinion would have provided Plaintiffs with a safe harbor from prosecution.

[4] The cases cited by Defendants deal with situations in which plaintiffs prevailed on their claims but did not have to resort to litigation to attain their relief, either because the defendant was willing to suspend the enforcement of the challenged statute or the defendant offered to settle the case with the plaintiff in a way which would have allowed the plaintiff to achieve what it intended.

based on the number of claims on which the petitioner was successful. *Reed v. County Miss, Inc.*, Nos. 93-6370, 94-5005, 1995 WL 348041, at *3 (6th Cir. June, 8, 1995) (citing *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 910 (6th Cir. 1991)). This analysis is in keeping with the dictates of the Supreme Court in *Hensley*, 461, U.S. at 436-38 & n.13. While it is fairly simple to allocate the hours spent exclusively in preparation of the successful claim, it is more difficult to allocate the hours spent on all seven claims. Therefore, the Court will reduce those hours proportionately.

Where the Court decides to reduce the number of hours proportionally, it must take into account the relative importance of the successful claims vis-a-vis the remaining claims. *Hensley*, 461, U.S. at 438. As the Court noted in its earlier opinion, the claim on which Plaintiffs prevailed was relatively unimportant. In addition, Plaintiffs spent far less time arguing the successful claim than the remaining claims in their conferences, oral arguments and written briefs. Finally, a straight proportional approach, which would award Plaintiffs one-seventh of the hours spent on tasks involving all seven claims, does not take into account the varying complexity of the challenged statutes. The statute involved in the successful claim was less complex that the other challenged statutes. It would seem, then, that Plaintiffs should be compensated for less than one-seventh of the time expended on all seven of the claims.

On the other hand, Plaintiffs also expended time on certain tasks that would have been completed whether or not the six unsuccessful claims had been filed. Since this is the case, Plaintiffs should be awarded more than merely one-seventh of the hours spent on all seven claims. The Court concludes that this factor balances out the relative unimportance of the successful claim. Therefore, the Court will reimburse Plaintiffs for one-seventh of the hours spent on all seven claims.

After calculating Plaintiffs' hours under this formula, the Court concludes that Plaintiffs should be awarded for a

total of approximately 33 hours in preparation of their successful claim. Admittedly, this is an imprecise measure. Valid arguments might counsel other results, either awarding greater of lesser fees. However, this method is a logically sound as any other and the result, viewed retrospectively, seems reasonable.

III.

Finally, the Court must consider Plaintiffs' right to a fee for the time spent preparing the fee petition. Plaintiffs are entitled to such a fee. *Weisenberger v. Huecker*, 593 F.2d 49, 53-54 (6th Cir. 1979).

While Plaintiffs may collect fees for the time spent preparing their fee position, the hours expended must be reasonable in light of the hours expended on the substantive claim. Plaintiffs requested approximately 60 hours for preparation of the fee petition, a total which is almost twice as many hours as the Court found reasonable for the substantive claim. As one court noted, "This is the tail wagging the dog, with a vengeance." *Ustiak v. Fairman*, 851 F. 2d 983, 987 (7th Cir. 1988) (reversing the district court's award which would allow the petitioners to collect fees for 15 minutes towards preparing the fee petition for every hour spent litigating the merits of the case). The court in that case disallowed 2/3 of the hours claimed for the preparation of the fee request, in light of the fact that in another case, the prevailing part submitted a bill for only 1.6 hours for the preparation of his request. *Id.* at 988.

Another factor the Court should take in to account in determining the number of hours to award Plaintiffs for preparation of the fee petition, is the fact that Plaintiffs did not prevail entirely on their own attorney's fees petition. Plaintiffs requested an award of approximately 79 hours spent on their successful claim. The Court has determined that Plaintiffs should only be compensated for 33 hours, 42% of what Plaintiffs requested. Just as the Plaintiffs were not

entirely successful on the seven claims they initially brought before this Court, they were also not entirely successful in seeking reimbursement for the claim on which they were successful. Similarly, just as the Plaintiffs' fee petition was reduced based on Plaintiffs' success on its claims, Plaintiffs' fee request for preparation of the fee petition should be reduced according to how successful Plaintiffs were in their fee petition. *See Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 924 (3d Cir. 1985) (explaining that compensation for the fee litigation should be reduced where compensation for the substantive claim has been reduced). The Court concludes that it is fair to allow Plaintiffs 42% of the hours contained in their fee request.

IV.

Now that the Court has determined the number of hours Plaintiffs should be compensated, it must determine the proper hourly billing rates for the attorneys.

The correct standard to use in determining proper billing rates is the prevailing market rate for similar service, reasonably comparable skill, experience and reputation. *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). Plaintiffs must show, with affidavits other than their own, that their billing rate is in keeping with market standards. Plaintiffs have submitted two affidavits (other than their own); however, the helpfulness of these affidavits is limited since the affiants make general statements about the rates of lawyers in the region. (See Ricketts and Beliles Affidavits). Neither mentions the going rate for similar cases or for attorneys with similar experience. Since Plaintiffs have not sustained their burden on this issue, the Court will have to make its own findings.

One method of determining the prevailing market rate of comparable attorneys for comparable services is by examining the hourly rate charged by Defendants' counsel. These rates are set with some respect for the competitive

market and deal with the same case. Defense Counsel, Jacklyn Elmore, admitted to practice in 1994, typically charges $93.00/hr. Defense Counsel, Sheryl Snyder, admitted to practice in 1973, typically charges $235.00/hr. Snyder has exceptional experience in this legal area. The Court will use these two rates as a standard.

James Bopp's experience as an attorney and expertise in this area or the law merits the $175/hr. fee charge. The Court will not attempt to distinguish the others based upon their specialized experience. Richard Coleson was admitted to practice in 1987. His billing rate of $150/hr. is excessive, using Defendants' counsel as the standard. The Court will reduce his billing rate to $125/hr. John Abeg was admitted to practice in 1993. His billing rate of $135/hr. is also excessive, given the fact that Elmore, admitted only one year after him charges $93/hr. The Court will reduce his billing rate to $105/hr. Maureen Devlin was admitted to practice in 1995. Her billing rate of $105/hr. is reasonable in light of the fact that Elmore, admitted a year *before* her, charges $93/hr. To be entirely consistent, her rate should be less than Ms. Elmore's and Mr. Abegg's. However, the Court views its job as only to determine whether the rate requested is within a reasonable range compared to the others. The Court believes that it is. Finally, Terry Fox was admitted to practice in 1977. His billing rate of $125/hr. is reasonable in light of his experience.

V.

From the foregoing analysis, the Court reaches the lodestar figure by multiplying the number of hours reasonably expended by the respective billing rates of Plaintiffs' counsel. The figures are as follows:

Hours Allocated Entirely to Successful Claims

Bopp:	.25 hrs	x 175	=	$ 43.75
Coleson:	.25 hrs	x 125	=	$ 31.25
Abegg:	2 hrs	x 105	=	$ 210.00
Devlin	------	-----		---------

Fox: Did not specifically identify hours spent going to successful claim

Hours Allocated to Successful and Unsuccessful Claims (1/7)

Bopp:	(37.5hrs) ÷ 7	=	5.357	x 175	=	$ 937.48
Coleson:	(1.5) ÷ 7	=	.214	x 125	=	$ 26.75
Abegg:	(149.75) ÷ 7	=	21.39	x 105	=	$ 2245.95
Devlin:	--------		------	-----		---------
Fox:	(29.85) ÷7	=	4.264	x 125	=	$533.00

Hours Allocated to Fee Petition

Bopp:	(1.75) + (1.5)	x 175	= $568.75	x .42	= $238.88
Coleson:	----------		-----		--------
Abegg:	(18.75) + (17.5)	x 05	= $3806.25	x .42	= $1598.63
Devlin:	(6.75) + (7.75)	x 105	= $1522.20	x. 42	= $ 639.45
Fox:	7.7	x 125	= $962.50	x .42	= $ 404.25

Total Fees on Substantive Claim:	$4028.18
Total Fees on Fee Petition:	$2881.21

The Court may reduce or enhance the lodestar figure. However, the Supreme Court has restricted the degree to which the figure can be adjusted. The Supreme Court in

Blum found that the "novelty" of the issue and "complexity" of the case were "fully reflected" in the number of billable hours, and should not further modify the lodestar figure. *Blum*, 465 U.S. at 888. Special skills and experience are already reflected in the reasonableness or the hourly rate. *Id.* In *Pennsylvania v. Delaware Citizens' Council*, the Supreme Court held that the quality of counsel's performance is already factored into the reasonable hourly rate. 478 U.S. 546, 566 (1986). Once the district court arrived at the lodestar figure, enhancement of that figure was the exception, not the rule. *Blum*, 465 U.S. at 902 n.18.

However, *Hensley* requires district courts to take into account the *extent of a plaintiff's success* in determining the proper amount of an award of attorney's fees. *Hensley*, 461 U.S. at 440. This can be done in one of two ways, depending on whether or not the Plaintiff's successful and unsuccessful claims are related. "Where the plaintiff has failed to prevail on a claim that is distinct in all respect from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." *Id.*

Plaintiff's claims should be considered unrelated since each dealt with a separate provision of Kentucky's election law, each dealt with separate issues and required separate research. *See Hensley*, 461 U.S. at 435 (explaining that claims are related if they arise for a "common core of facts" or related legal theories)[5].

Since the claims are unrelated, the Court could take the "extent of Plaintiff's success" factor into account by excluding the hours Plaintiffs spent on the other claims; however, the Court has already taken this figure into account. Since the Plaintiffs were fully successful on this claim--the Court enjoined the further enforcement of the contested provision, the Court should not further reduce the Plaintiff's fee award.

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[5] The seven claims brought by Plaintiffs were a "series of discrete claims." *Hensley*, 461 U.S. at 435

Finally, the Court notes that costs incurred by the prevailing party are also recoverable. *Webermeier*, 738 F.2d at 192. Therefore, the Court will add these figures to the lodestar figure. The costs associated with the attorney's fees petition is $67.94. The costs incurred in preparation of the substantive claim is $91.77. The Court will add these two figures to the lodestar amount to reach the final figure Plaintiffs should be compensated.

The Court will issue an order consistent with this memorandum opinion.

\s\ _____
JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

CHAPTER 121
CAMPAIGN FINANCE REGULATION

SECTION.

121.010. [Repealed.]

121.015. Definitions for chapter.

121.020. [Repealed.]

121.025. Corporate contributions to candidates prohibited.

121.030. [Repealed.]

121.035. Corporate contributions to aid candidates for public office prohibited - Aid to support a public issue permitted.

121.040. [Repealed.]

121.045. Contributions to certain candidates or slates of candidates by individuals prohibited.

121.050. [Repealed.]

121.055. Candidates prohibited from making expenditure, loan, promise, agreement or contract as to action when elected, in consideration for vote.

121.056. Restrictions upon specified campaign contributors.

121.060. [Repealed.]

121.065. Limitation of political advertising rates - Injunction.

121.070. [Repealed.]

Registry of Election Finance

121.100. [Repealed.]

121.110. Registry of Election Finance - Membership - Terms - Meetings - Compensation.

121.120. Duties and powers of registry - Appointment of certain employees.

121.130. Dissemination of information to candidates, treasurers, depositories and general public.
121.135. Advisory opinion by registry - Effect - Publication.
121.140. Investigation of complaint - Conciliation agreement hearing - Issuance of order - Reference for possible prosecution - Judicial review.
121.150. Campaign contribution and loan restrictions and expenditure limitations.
121.160. Campaign treasurers - Duties.
121.170. Registration of committees and fundraisers - Information required - Permanent committee by member of General Assembly prohibited.
121.175. Allowable campaign expenditures - Administrative regulations - Penalties.
121.180. Reports required of committees and treasurers - Exemptions - Administrative fee - Exceptions - Use of campaign funds - Disposition of unexpended campaign funds - Reports of purveyors of communications and advertising services.
121.190. Identification of contributors and advertisers.
121.200. Reports to be kept four years - Admissibility as evidence. [Repealed.]
121.210. Central campaign committee - Designation - Duties - Unauthorized or disavowed campaign committee.
121.220. Primary campaign depository - Secondary depository - Deposits - Statements.
121.230. Use of portion of income tax designated to political party - Records and reports - Audit.

Prohibitions

121.310. Coercement of employee's vote prohibited.

121.320. Assessment of state or federal employee prohibited.
121.330. Restrictions on elected officials and their appointees in dealing with certain contributors and fundraisers.

Penalties

121.990. Penalties.

121.010. Proclamation for special election for Governor. [Repealed.]

Compiler's Notes. This section (1523-2, 1525: Acts 1966, ch. 239, § 129) was repealed by Acts 1974, ch. 130, § 198. For present law, see KRS 118.710.

§ 121.015. Definitions for chapter.

As used in this chapter:

(1) "Registry" means the Kentucky Registry of Election Finance;

(2) "Election" means any primary, runoff primary, regular, or special election to fill vacancies regardless or whether a candidate or slate of candidates is opposed or unopposed in an election. Each primary, runoff primary, regular, or special election shall be considered a separate election;

(3) "Committee" includes the following:

(a) "Campaign committee," which means one (1) or more persons who receive contributions and make expenditures to support or oppose one (1) or more specific candidates or slates of candidates for nomination or election to any state, county, city, or district office;

(b) "Political issues committee," which means three (3) or more persons joining together to advocate or oppose a constitutional amendment or public question which appears on the ballot if that committee receives or expends money in excess of one thousand dollars ($1,000);

(c) "Permanent committee," which means a group of individuals, including an association, committee or organization, other than a campaign committee, political issues committee, inaugural committee, or a party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose political activity which may include support of or opposition to selected candidates, slates of candidates, political parties, or issues of public importance, and which functions on a regular basis throughout the year;

(d) An executive committee of a political party; and

(e) "Inaugural committee," which means one (1) or more persons who receive contributions and make expenditures in support of inauguration activities for any candidate or slate of candidates elected to any state, county, city, or district office;

(4) "Contributing organization" means a group which merely contributes to candidates, campaign committees, or executive committees from time to time from funds derived solely from within the group, and which does not solicit or receive funds from sources outside the group itself. However, any contributions made by the groups in excess of one hundred dollars ($100) shall be reported to the registry;

(5) "Testimonial affair" means an affair held in honor of a person who holds or who is or was a candidate for nomination or election to a political office in this state designed to raise funds for any purpose not charitable, religious, or educational;

(6) "Contribution" means any:

(a) Payment, distribution, loan, deposit, or gift of money or other thing of value, to a candidate, his agent, a slate of candidates, its authorized agent, a committee, or contributing organization. As used in this subsection, "loan" shall include a guarantee, endorsement, or other form of security where the risk of nonpayment rests with the surety, guarantor, or endorser, as well as with a committee, contributing organization, candidate, slate of candidates, or other primary obligor. No person shall become liable as surety, endorser, or guarantor for any sum in any one (1) election which, when combined with all other contributions the individual makes to a candidate, his agent, a slate of candidates, its agent, a committee, or a contributing organization, exceeds the contribution limits provided in KRS 121A.050 or KRS 121.150;

(b) Payment by any person other than the candidate, his authorized treasurer, a slate of candidates, its authorized treasurer, a committee, or a contributing organization, of compensation for the personal services of another person which are rendered to a candidate, slate of candidates, committee, or contributing organization, or for inauguration activities;

(c) Goods, advertising, or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are

furnished to a candidate, slate of candidates, committee, or contributing organization or for inauguration activities without charge, or at a rate which is less than the rate normally charged for the goods or services;

(d) Payment by any person other than a candidate, his authorized treasurer, a slate of candidates, its authorized treasurer, a committee, or a contributing organization for any goods or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are utilized by a candidate, slate of candidates, committee, or contributing organization, or for inauguration activities; or

(e) Expenditure in connection with any other activity undertaken independently of the activities of a candidate, slate of candidates, committee, or contributing organization made or furnished for the purpose of influencing the results of an election;

(7) Notwithstanding the foregoing meanings of "contribution," the word shall not be construed to include:

(a) Services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate, committee, or contributing organization; or

(b) A loan of money by any financial institution doing business in Kentucky made in accordance with applicable banking laws and regulations and in the ordinary course of business;

(8) "Candidate" means any person who has received contributions or made expenditures, has appointed a campaign treasurer, or has given his consent for any other person to receive contributions or make

expenditures with a view to bringing about his nomination or election to public office, except federal office;

(9) "Slate of candidates" means any two (2) persons who have filed a joint notification and declaration pursuant to KRS 118.127, received contributions or made expenditures, appointed a campaign treasurer, designated a campaign depository, or given their consent for any other person to receive contributions or make expenditures with a view to bringing about their nomination for election the offices of Governor and Lieutenant Governor. Unless the context requires otherwise, any provision of law that applies to a candidate shall also apply to a slate of candidates;

(10) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or should have been aware that his conduct is of that nature or that the circumstance exists; and

(11) "Fundraiser" means an individual who directly solicits and secures contributions on behalf of a candidate or slate of candidates for a statewide-elected state office or an office in a jurisdiction with a population in excess of two hundred thousand (200,000) residents.

(Enact. Acts 1974, ch. 130, §178; 1980, ch. 292, § 1, effective July 15, 1980; 1986, ch. 100, § 1, effective July 15, 1986; 1992, ch. 288, § 15, effective July 14, 1992; 1994, ch. 458, § 1, effective July 15, 1994.)

§ 121.025. Corporate contributions to candidates prohibited.

No corporation authorized to do business in this state or in another state, and no officer or agent in a corporation on its

behalf, shall contribute, either directly or indirectly, any money, service, or other thing of value towards the nomination or election of any state, county, city, or district officer in this state, or pay, promise, loan, or become liable in any way for any money or other valuable thing on behalf of any candidate for office at any election, primary or nominating convention held in this state. No attorney or other person shall accept employment and compensation from a corporation with the understanding or agreement, either direct or implied, that he will contribute to any such candidate, or on his behalf, any part or all of such compensation, towards the nomination or election of such candidate.

(Enact. Acts 1974, ch. 130, § 179; 1984, ch. 111, § 66, effective July 13, 1984; 1994, ch. 458, § 2, effective July 15, 1994.)

§ 121.035. Corporate contributions to aid candidates for public office prohibited - Aid to support a public issue permitted.

(1) No corporation organized or authorized to do business in this state or in another state shall, by itself or by or through an officer, agent, attorney, or employee, subscribe, give, procure or furnish, or afterwards reimburse or compensate in any way any person who has subscribed, given, procured, or furnished, any money, privilege, favor, or other thing of value to any political or quasi-political organization, or any officer or member thereof, to be used by such organization for the purpose of aiding, assisting, or advancing any candidate for public office in this state in any way whatever.

(2) No officer, agent, attorney, or employee of any corporation organized or authorized to do business in this state or in another state, or person acting for or representing any such corporation, shall disburse,

distribute, pay out, or in any way handle any money, funds, or other thing of value that belongs to or has been or is being furnished by any such corporation or any officer, agent, attorney, or employee thereof to be used or employed in any way for the purpose of aiding, assisting, or advancing any candidate for public office in this state in any way whatever.

(3) Nothing in this section shall be construed to prohibit a corporation from making contributions in support of a position on an issue of public importance.

(Enact. Acts 1974, ch. 130, § 179, ch. 292, § 2, effective July 15, 1980; 1994, ch. 458, § 3, effective July 15, 1994.)

§ 121.135. Advisory opinion by registry - Effect - Publication.

(1) Any person may file a written request with the registry for an advisory opinion concerning the application of the provisions of this chapter or any administrative regulation promulgated by the registry with respect to a specific transaction or activity by the person. The registry shall render a written advisory opinion relating to the specific transaction or activity to the person making the request not later than thirty (30) days after the registry receives the request.

(2) If a candidate, slate of candidates, or either of their campaign committees files a written request with the registry for an advisory opinion not more than thirty (30) days before the date of an election at which the candidate or slate of candidates shall appear on the ballot, the registry shall render a written advisory opinion relating to the request not later than twenty (20) days after the registry receives a complete request.

(3) No advisory opinion shall be issued by the registry or any of its employees except in accordance with the provisions of this section.

(4)

(a) Any advisory opinion rendered by the registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is rendered.

(b) Notwithstanding any other provision of law, any person or committee to whom a written advisory opinion has been rendered who relies upon any provision or finding of the advisory opinion and who acts in good faith in accordance with the provisions and findings of the advisory opinion shall not, as a result of any act with respect to a transaction or activity addressed by the advisory opinion, be subject to any sanction provided by this chapter or any administrative regulation promulgated by the registry.

(c) It shall be no defense in any civil or criminal proceeding regarding a violation of any provision of this chapter or any administrative regulation promulgated by the registry for a person or committee to claim that he relied upon and acted in good faith based upon any provision or finding of an advisory opinion if the person or committee was not the person or committee involved in the specific transaction or activity with respect to which the advisory opinion was rendered.

(5)

(a) The registry shall make public all written requests for an advisory opinion made under subsection (1) or (2) of this section. Before

rendering an advisory opinion, the registry shall accept written comments submitted by any interested party within the ten (10) day period following the date the request is made public.

(b) The registry shall make public all advisory opinions rendered under subsection (1) or (2) of this section.

(Enact. Acts 1992, ch. 288, § 45, effective July 14, 1992.)

§ 121.150. Campaign contribution and loan restrictions and expenditure limitations.

(1) No contribution of money or other thing of value, nor obligation therefor, shall be made or received, and no expenditure of money or other thing of value shall be made or incurred, directly or indirectly, other than an "independent expenditure," to support inauguration activities or to support or defeat a candidate, slate of candidates, constitutional amendment, or public question which will appear on the ballot in an election, except through the duly appointed campaign manager, or campaign treasurer of the candidate, slate of candidates, or registered committee. As used in this section, "independent expenditure" means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, or the passage or defeat of a constitutional amendment or public question which will appear on the ballot and which is not made with any direct or indirect cooperation, consent, request, suggestion, or consultation involving a candidate, slate of candidates, campaign committee, political issues committee, or agent. No candidate, slate of candidates, campaign committee, political issues committee, nor anyone acting on their

behalf shall have any communication with another person nor anyone on his behalf regarding that person's making of an independent expenditure on behalf of the candidate, slate, or committee prior to the time the independent expenditure is made. Any person making an "independent expenditure," as define in this subsection, shall report these expenditures when the expenditures exceed five hundred dollars ($500) in the aggregate in any one (1) election, on a form provided by the registry and shall sign a statement on the form, under penalty of perjury, that the expenditure was an actual expenditure and that there was no prior communication with the campaign on whose behalf it was made.

(2) Except as provided in KRS 121.180(10), the solicitation from and contributions by candidates, slates of candidates, campaign committees, political issues committees, permanent committees, and party executive committees to any religious, charitable, civic, eleemosynary, or other causes or organizations established primarily for the public good is expressly prohibited; except that it shall not be construed as a violation of this section for a candidate or slate of candidates to continue regular personal contributions to religious, civic, or charitable groups.

(3) No candidate, slate of candidates, committee, or contributing organization, nor anyone acting on their behalf, shall accept any anonymous contribution in excess of fifty dollars ($50), and all anonymous contributions in excess of fifty dollars ($50) shall be returned to the donor, if the donor can be determined. If no donor is found, the contribution shall escheat to the state and be transferred to the election campaign fund established by KRS 121A.020. No candidate, slate of candidates, committee, or contributing organization, nor anyone acting on their behalf shall

accept anonymous contributions in excess of one thousand dollars ($1,000) in the aggregate in any one (1) election. Anonymous contributions in excess of one thousand dollars ($1,000) in the aggregate which are received in any one (1) election shall escheat to the state and be transferred to the election campaign fund established by KRS 121A.020.

(4) No candidate, committee, or contributing organization, nor anyone on their behalf, shall accept a cash contribution in excess of fifty dollars ($50) in the aggregate from each contributor in any one (1) election. No candidate, committee, or contributing organization, nor anyone on their behalf, shall accept a cashier's check or money order in excess of the maximum cash contribution limit unless the instrument clearly identifies both the payor and the payee. A contribution made by cashier's check or money order which identifies both the payor and payee shall be treated as a contribution made by check for purposes of the contribution limits contained in this section. No person shall make a cash contribution in excess of fifty dollars ($50) in the aggregate in any one (1) election to a candidate, committee, or contributing organization, nor anyone on their behalf.

(5) No candidate, slate of candidates, committee, contributing organization, nor anyone on their behalf, shall accept any contribution in excess of one hundred dollars ($100) from any person who shall not become eighteen (18) years of age on or before the day of the next general election.

(6) No candidate, campaign committee, political issues committee, nor anyone acting on their behalf, shall accept a contribution of more than five hundred dollars ($500) from any person, permanent committee, or contributing organization in any one (1) election; except that no candidate for school

board, his campaign committee, nor anyone acting on their behalf shall accept a contribution of more than one hundred dollars ($100) from any person or more than two hundred dollars ($200) from any permanent committee or contributing organization in any one (1) election. No person, permanent committee, or contributing organization shall contribute more than five hundred dollars ($500) to any one (1) candidate, campaign committee, political issues committee, nor anyone acting on their behalf, in any one (1) election; except that no person shall contribute more than one hundred dollars ($100) and no permanent committee or contributing organization shall contribute more than two hundred dollars ($200) to any one (1) school board candidate, his campaign committee, nor anyone acting on their behalf, in any one (1) election. Limits on contributions for slates of candidates for Governor and Lieutenant Governor which may be made or received in any one (1) election shall be governed by the provisions of KRS 121A.050.

(7) Permanent committees or contributing organizations affiliated by bylaw structure or by registration, as determined by the Registry of Election Finance, shall be considered as one (1) committee for purposes of applying the contribution limits of subsection (6) of this section.

(8) No permanent committee shall contribute funds to another permanent committee for the purpose of circumventing contribution limits of subsection (6) of this section.

(9) No person shall contribute funds to a permanent committee, political issues committee, or contributing organization for the purpose of circumventing the contribution limits of subsection (6) of this section.

(10) No person shall contribute more than one thousand five hundred dollars ($1,500) to all permanent

committees and contributing organizations in any one (1) year.

(11) No person shall contribute more than two thousand five hundred dollars ($2,500) to the state executive committee of a political party and its subdivision and affiliates in any one (1) year. Contributions a person makes to a political party in excess of one thousand dollars ($1,000) in any one (1) year shall be deposited in a separate account which the state executive committee maintains for the exclusive purpose of paying administrative costs incurred by the political party.

(12) No person shall make a payment, distribution, loan, advance, deposit of gift of money to another person to contribute to a candidate, committee, contributing organization, or anyone on their behalf. No candidate, committee, contributing organization, nor anyone on their behalf shall accept a contribution made by one (1) person who has received a payment, distribution, loan, advance, deposit or gift of money from another person to contribute to a candidate, committee, contributing organization, or anyone on their behalf.

(13) No candidates running as a slate for the offices of Governor and Lieutenant Governor shall make combined total personal loans to their committee in excess of fifty thousand dollars ($50,000) in any one (1) election. No candidate for any other statewide elected state office shall lend to his committee any amount in excess of twenty-five thousand ($25,000) in any one (1) election. In campaigning for all other offices, no candidate shall lend to his committee more than ten thousand dollars ($10,000) in any one (1) election.

(14) No candidate or slate of candidates for nomination to any state, county, city or district office, nor their campaign committees, nor anyone on their behalf,

shall solicit or accept contributions for primary election expenses after the date of the primary. No person other than the candidate or slate of candidates shall contribute for primary election expenses after the date of the primary.

(15) No slate of candidates for nomination for election to the offices of Governor and Lieutenant Governor, nor its campaign committees, nor anyone on their behalf, shall solicit or accept contributions for runoff primary election expenses after the date of the runoff primary. No person other than the slated candidates shall contribute for runoff primary election expenses after the date of the runoff primary.

(16) No candidate or slate of candidates for any state, county, city, or district office at a regular election, nor their campaign committees, nor anyone on their behalf, shall solicit or accept contributions for regular election expenses after the date of the regular election. No person other than the candidate or slate of candidates shall contribute for regular election expenses after the date of the regular election.

(17) No candidate, or slate of candidates for nomination or election to any state, county, city, or district office, nor their campaign committees, nor anyone on their behalf, shall solicit or accept contributions for special election expenses after the date of the special election.

(18) Nothing in subsections (14) to (17) of this section shall be deemed to prohibit a slate of candidates from receiving transfers from the election campaign fund established by KRS 121A.020 for which it is eligible for matches of qualifying contributions received prior to the date of the election.

(19) The provisions of subsections (14) and (16) of this section shall apply only to those candidates in a primary or regular election which shall be conducted subsequent to January 1, 1989. The provisions of

subsections (15) and (17) of this section shall apply only to those candidates or slates of candidates in a runoff primary or special election which shall be conducted subsequent to January 1, 1993.

(20) No slate of candidates for Governor and Lieutenant Governor or their immediate families shall loan any money, service, or other thing of value to their campaign, and all moneys, services, or other things of value which are loaned shall be deemed a contribution, which may not be recovered by the slate of candidates, except to the extent of a combined total of fifty thousand dollars ($50,000).

(21) No candidate, slate of candidates, committee, except a political issues committee, or contributing organization, nor anyone on their behalf, shall knowingly accept a contribution from a corporation, directly or indirectly.

(22) Nothing in this section shall be construed to restrict the ability of a corporation to administer its permanent committee insofar as its actions can be deemed not to influence an election as prohibited by KRS 121.025.

(23) In addition to the prohibitions set forth in this section, no slate of candidates shall accept any contribution during the thirty (30) days immediately preceding a primary or regular election except as provided in KRS 121A.030(5).

(24) No candidate, slate of candidates, or committee, nor anyone on their behalf, shall solicit a contribution of money or services from a state employee, whether or not the employee is covered by the classified service provision of KRS Chapter 18A. However, it shall not be a violation of this subsection for a state employee to receive a solicitation directed to him as a registered voter in an identified precinct as a part of an overall plan to contact voters not identified as state employees.

(25) A candidate for elective public office, except slates of candidates for Governor and Lieutenant Governor, shall not accept contributions from permanent committees which, in the aggregate, exceed thirty-five percent (35%) of the total contributions accepted by the candidate in any one (1) election cycle or five thousand dollars ($5,000) in any one (1) election cycle, whichever is the greater amount. For the purposes this subsection, "election cycle" means the period between regular elections for the office a candidate seeks. The percentage of the total contributions or dollar amounts of contributions accepted by a candidate in an election cycle that is accepted from permanent committees shall be calculated as of the regular election day that ends the election cycle. Funds in a candidate's campaign account which are carried forward from one (1) election cycle to another shall not be considered in calculating the acceptable percentage or dollar amount of contributions which may be accepted from permanent committees for the election cycle for which the funds are carried forward. A candidate may, without penalty, contribute funds to his campaign account not later than twenty (20) days following the election cycle so as not to exceed the permitted percentage or dollar amount of contributions which may be accepted from permanent committees or the candidate may, not later than twenty (20) days after the end of the election cycle, refund any excess permanent committee contributions on a pro rata basis to the permanent committees whose contributions are accepted after the aggregate limit has been reached.

(26) No candidate or slate of candidates for any office in this state shall accept a contribution, including an in-kind contribution, which is made from funds in a federal campaign account. No person shall make a

contribution, including an in-kind contribution, from funds in a federal campaign account to any candidate or slate of candidates for any office in this state.

(Enact. Acts 1974, ch. 130, § 187; 1980 ch. 292 § 6, effective July 15, 1980; 1986 ch. 100, §4, effective July 15, 1986; 1986 ch. 168, § 1, effective July 15, 1986; 1988 ch. 15 § 1, effective July 15, 1986; 1988 ch. 15 § 1, effective July 15, 1988; 1988 ch. 55, § 1, effective March 11, 1988; 1988 ch. 118 § 2, effective 1991; 1988 ch. 341, § 43, effective July 15, 1988; 1990 ch. 314, effective July 13, 1990; 1990 ch. 476, Pt. II, § 73, effective July 13, 1990; 1992, ch. 288, § 25, effective July 14, 1992*; 1993 (1st Ex. Sess.), ch. 4, § 57, effective September 16, 1993; 1994, ch. 458, § 8, effective July 15, 1994.)

***Compiler's Notes.** Section 62 of Acts 1992, ch. 288 provides: "The provision of Section 25 [KRS 121.150] and subsection (6)(b) of Section 28 [KRS 121.180] of this Act relating to limitation on contributions and administrative fees on contributions to candidates by permanent committees, shall first apply to elections held and contributions made, respectively, after January 1, 1993. Subject to the limitations of subsection (6) of Section 8 [KRS 121 A.080] of this Act, the balance a candidate has in his campaign account as of December 31, 1992 shall not be subject to the limitations of Section 25 [KRS 121.150] of this Act and may be used for future campaign expenses."

***Compiler's Notes.** Section 86 of Acts 1993 (1st Ex. Sess.), Ch. 4 provided that: "The balance a candidate has in his campaign account on November 2, 1993, shall not be subject to the limitations of subsection (25) of Section 57 [KRS 121.150] of this Act."

Section 88 (1) of Acts 1993 (1st Ex. Sess.), Ch. 4 provided that subsections (4) and (25) of KRS 121.150 should become effective November 3, 1993; however, § 88 (2) provided that notwithstanding subsection (1) of § 88,

subsection (4) and (25) of KRS 121.150 as amended by the Act "shall not apply to the primary and regular elections held in 1993"; section 89 of Acts 1993 (1st Ex. Sess.), Ch. 4 provided that the provisions of subsections (7) and (10) of KRS 121.150 should become effective January 1, 1994.

§ 121.180. Reports required of committees and treasurers - Exemptions - Administrative fee - Exceptions - Use of campaign funds - Disposition of unexpended campaign funds - Reports of purveyors of communications and advertising services.

(1)

(a) Any candidate, slate of candidates, or political issues committee shall be exempt from filing any pre-election finance reports required by subsection (3) of this section or KRS 121A.020(5), whichever is applicable, if the candidate, slate of candidates, or political issues committee chairman files a form prescribed and furnished by the registry stating that contributions will not be accepted or expended in excess of three thousand dollars ($3,000) in any one (1) election to further the candidacy or to support or oppose a constitutional amendment or public question which will appear on the ballot. For a candidate for judicial office who desires to be exempt from filing preelection campaign finance reports as provided in this paragraph, the request for exemption shall be filed by the campaign treasurer of the candidate's campaign committee, but the candidate shall be personally liable for any violation if the campaign treasurer accepts contributions or make expenditures in excess of the limit and

shall be subject to the same penalties as a candidate as provided in subparagraph (k)1. or 2. of this subsection. A separate form shall be required for each primary, runoff primary, regular, or special election in which the public question appears on the ballot. The form shall be filed with the same office with which a candidate or slate of candidates files nomination papers or, in the case of political issues committee, with the registry.

(b) Any candidate, slate of candidates, or political issues committee shall be exempt from filing any campaign finance reports required by subsections (3) and (4) of this section or KRS 121A.020(5), whichever is applicable, if the candidate, slate of candidates, or political issues committee chairman files a form prescribed and furnished by the registry stating that currently no contributions have been received and that contributions will not be accepted or expended in excess of two hundred fifty dollars ($250) in any one (1) election. For a candidate for judicial office who desires to be exempt from filing any campaign finance reports as provided in this paragraph, the request for exemption shall be filed by the campaign treasurer of the candidate's campaign committee, but the candidate shall be personally liable for any violation if the campaign treasurer accepts contributions or makes expenditures in excess of the limit and shall be subject to the same penalties as a candidate as provided in subparagraph (k)1. or 2. of this subsection. A separate form shall be required for each primary, runoff primary, regular, or special election in which the public question appears

on the ballot. The form shall be filed with the same office with which a candidate or slate of candidates files nomination papers or, in the case of political issues committee, with the registry.

(c) For a primary election, a candidate or slate of candidates shall file a request for exemption not later than the deadline for filing nomination papers and shall be bound by its terms unless it is rescinded in writing not later than fifteen (15) days after the filing deadline. For a runoff primary election, a slate of candidates shall file its request for exemption not later than five (5) days after the date of the preceding primary election and shall be bound by its terms unless rescinded in writing not later than ten (10) days after the date of the preceding primary election. For a regular election, a candidate or slate of candidates shall file a request for exemption not later than ten (10) days after the date of the preceding primary election, or runoff primary, if one is held, and shall be bound by its terms unless it is rescinded in writing not later than twenty-five (25) days after the date of the primary election, or runoff primary, if one is held. For a special election, a candidate or slate of candidates shall file a request for exemption not later than ten (10) days after the candidate or slate of candidates is nominated for a special election and shall be bound by its terms unless it is rescinded in writing not later than twenty-five (25) days after the date on which the nomination for special election is made. A political issues committee chairman shall file a request for exemption not later than ten (10) days after

the date on which the committee registers with the registry and shall be bound by its terms unless it is rescinded in writing not later than fifteen (15) days after the date on which the request for exemption is filed.

(d) A candidate or slate of candidates that revokes a request for exemption in a timely manner may exercise the remaining option or may file all reports required of a candidate intending to raise or spend in excess of three thousand dollars ($3,000) in an election. If a candidate or slate of candidates elects to exercise a different option, the candidate of slate of candidates shall file the appropriate form with the officer who received the filing papers of the candidate or slate of candidates not later than the deadline for filing a revocation.

(e) Any candidate or slate of candidates that is subject to an August filing deadline and that intends to execute a request for exemption shall file the appropriate request for exemption not later than the filing deadline and shall be bound by its terms unless it is rescinded in writing not later than fifteen (15) days after the filing deadline. A candidate or slate of candidates that is covered by this paragraph shall have the same reversion rights as those provided in paragraph (d) of this subsection.

(f) Any candidate or slate of candidates that will appear on the ballot in a regular election that has signed either request for exemption for that election may exercise the reversion rights provided in paragraph (d) of this subsection if a candidates or slate of candidates that is subject to an August filing deadline

subsequently files in opposition to the candidate or slate of candidates. A candidate or slate of candidates covered by this paragraph shall comply with the deadline for rescission provided in paragraph (d) of this subsection.

(g) Any candidate or slate of candidates that has filed a request for exemption for a regular election that later is opposes by a person who has filed a declaration of intent to receive write-in votes may rescind the request for exemption and exercise the reversion rights provided in paragraph (d) of this subsection.

(h) Any candidate or slate of candidates that has filed a request for exemption may petition the registry to determine whether another person is campaigning as a write-in candidate prior to having filed a declaration of intent to receive write-in votes, and, if the registry determines upon a preponderance of the evidence that a person who may later be a write-in candidate is conducting a campaign, the candidate or slate of candidates may petition the registry to permit the candidate or slate of candidates to exercise the reversion rights provided in paragraph (d) of this subsection.

(i) If the opponent of a candidate or slate of candidates is replaced due to his withdrawal because of death, disability, or disqualification, the candidate or slate of candidates may exercise the reversion rights provided in paragraph (d) of this subsection not later than fifteen (15) days after the party executive committee nominates a replacement for the withdrawn candidate or slate of candidates.

(j) The campaign committee of any candidate or slate of candidates that has filed a request for exemption or a political issues committee whose chairman has filed a request for exemption shall be bound by its terms unless it is rescinded in a timely manner and no new request for exemption has been executed.

(k)

1. Any candidate, slate of candidates, or political issues committee that is exempt from filing campaign finance reports pursuant to paragraph (a), (b), or (e) of this subsection that accepts contributions or makes expenditures, or whose campaign treasurer accepts contributions or make expenditures, in excess of the applicable limit in any one (1) election without rescinding the request for exemption in a timely manner shall comply with all applicable reporting requirements and, in lieu of other penalties prescribed by law, pay a fine of not more than five hundred dollars ($500) plus the amount by which the spending limit was exceeded.

2. A candidate, slate of candidates, campaign committee, or political issues committee that is exempt from filing campaign finance reports pursuant to paragraph (a), (b), or (e) of this subsection that knowingly accepts contributions or makes expenditures in excess of the applicable spending limit in any one (1) election without rescinding the request for exemption in a timely manner shall comply with

all applicable reporting requirements and shall be guilty of a Class D felony.

(2) State and county executive committee shall make a full report, upon a prescribed form, to the registry, of all money, loans, or other things of value, received from any source, and expenditures authorized, incurred, or made, since the date of the last report, including:

(a) For each contribution of any amount made by a permanent committee, the name and business address of the permanent committee, the date of the contribution, the amount contributed, and a description of the major business, social, or political interest represented by the permanent committee;

(b) For other contributions in excess of one hundred dollars ($100), the full name, address, age if less than the legal voting age, the date of the contribution, the amount of the contribution, and the employer and occupation of each contributor. If the contributor is self-employed, the name under which he is doing business shall be listed;

(c) The total amount of cash contributions during the reporting period; and

(d) A complete statement of expenditures authorized, incurred, or made. The complete statement of expenditures shall include the name and address of each person to whom an expenditure is made in excess of twenty-five dollars ($25), and the amount, date, and purpose of each expenditure. This report shall be made to the registry within thirty (30) days after the primary, runoff primary if slates of candidates of that party participate, and regular elections. If an individual gives a reportable contribution to a state or county

executive committee with the intention that the contribution or portion of the contribution go to a candidate or slate of candidates, the name of the contributor and the sum shall be indicated on the committee report. The receipts and expenditures of funds remitted to each political party under KRS 141.071 to 141.073 shall be separately accounted for and reported to the registry in the manner required by KRS 121.230. The separate report may be made a separate section within the report required, by this subsection, to be submitted within thirty (30) days after each regular election.

(3)

(a) Except for candidates or slates of candidates, campaign committees, or political issues committees exempted from reporting requirements pursuant to subsection (1) of this section, each campaign treasurer of a candidate, slate of candidates, campaign committee, or political issues committee who accepts contributions or expends, excepts to accept contributions or expend, or contracts to expend more than three thousand dollars ($3,000) in any one (1) election, and each fundraiser who secures contributions in excess of three thousand dollars ($3,000) in any one (1) election, shall make a full report, upon a prescribed form, to the registry, of all money, loans, or other things of value, received from any source, and expenditures authorized, incurred, and made, since the date of the last report, including:

1. For each contribution of any amount made by a permanent committee, the name and business address of the

permanent committee, the date of the contribution, the amount contributed, and a description of the major business, social, or political interest represented by the permanent committee;

2. For each contribution in excess of one hundred dollars ($100) made to a candidate or slate of candidates for a statewide-elected state office, or to a campaign committee for a candidate or slate of candidates for a statewide-elected state office, the date, name, address, occupation, and employer of each contributor and the spouse of the contributor or, if the contributor or spouse of the contributor is self-employed, the name under which he is doing business, and the amount contributed by each contributor; and

3. For each contribution in excess of one hundred dollars ($100) made to any candidate or campaign committee other than those specified in subparagraph 2. or a political issues committee, the full name, address, age if less than the legal voting age, the date of the contribution, the amount of the contribution, and the employer and occupation of each other contributor. If the contributor is self-employed, the name under which he is doing business shall be listed;

4. The total amount of cash contributions received during the reporting period; and

5. A complete statement of all expenditures authorized, incurred, or made. The complete statement of expenditures shall include the name, address, and occupation of each person to whom an expenditure is made in excess of twenty-five dollars ($25), and the amount, date, and purpose of each expenditure.

(b) Reports of all candidates, campaign committees, political issues committees, and registered fundraisers shall be made as follows:

1. Candidates as defined in KRS 121.015(8), campaign committees, political issues committees, and fundraisers which register in the year before the year an election in which the candidate or public question shall appear on the ballot, shall file financial reports with the registry at the end of the first calendar quarter after the person becomes a candidate or following registration of the committee or fundraiser, and each calendar quarter thereafter, ending with the last calendar quarter of that year. Candidates, committees, and registered fundraisers shall make all reports required by this section during the year in which the election takes place;

2. All candidates, campaign committees, political issues committees, and registered fundraisers shall make reports on the thirty-second day preceding an election, including all

previous contributions and expenditures;

3. All candidates, campaign committees, political issues committees, and registered fundraisers shall make reports on the fifteenth day preceding the date of the election; and

4. All reports to the registry shall be in the hands of the registry or postmarked within five (5) days after each filing deadline.

(4) Except for candidates, slates of candidates, and political issues committees, exempted pursuant to subsection (1)(b) of this section, all candidates, regardless of funds received or expended, campaign committees, political issues committees, and registered fundraisers shall make post-election reports within the thirty (30) days after the election.

(5) In making the preceding reports, the total gross receipts from each of the following categories shall be listed: proceeds from the sale of tickets for events such as testimonial affairs, dinners, luncheons, rallies, and similar fundraising events, mass collections made at the events, and sales of items such as campaign pins, buttons, hats, ties, literature, and similar materials. When any individual purchase or the aggregate purchases of any item enumerated above from a candidate or slate of candidates for a statewide-elected state office or a campaign committee for a candidate or slate of candidates for a statewide-elected state office exceeds one hundred dollars ($100), the purchaser shall be identified by name, address, age, if less than the legal voting age, occupation, and employer and the employer of the spouse of the purchaser, if the purchaser or the spouse of the purchaser is self-employed, the name under which he is doing business, and the amount of

the purchase. When any individual purchase or the aggregate purchases of any item enumerated above from any candidate or campaign committee other than a candidate or slate of candidates for a statewide-elected state office or campaign committee for a candidate or slate of candidates for a statewide-elected state office exceeds one hundred dollars ($100), the purchaser shall be identified by name, address, age if less than the legal voting age, occupation, and employer, or if the purchaser is self-employed, the name under which he is doing business, and the amount of the purchase. The lists shall be maintained by the campaign treasurer, political issues committee treasurer, registered fundraiser, or other sponsor for inspection by the registry for six (6) years following the date of the election.

(6)

(a) Each permanent committee, except a federally-registered out-of-state permanent committee, inaugural committee, or contributing organization shall make a full report, upon a prescribed form, to the registry of all money, loans, or other things of value, received by it from any source, and all expenditures authorized, incurred, or made, since the date of the last report, including:

1. For each contribution of any amount made by a permanent committee, the name and business address of the permanent committee, the date of the contribution, the amount contributed, and a description of the major business, social, or political interest represented by the permanent committee;

2. For other contributions in excess of one hundred dollars ($100), the full name, address, age if under the legal voting age, the date of the contribution, the amount of the contribution, and the employer and occupation of each contributor. If the contributor is self-employed, the name under which he is doing business shall be listed;

3. An aggregate amount of cash contributions, the amount contributed by each contributor, and the date of each contribution; and

4. A complete statement of all expenditures authorized, incurred, or made, including "independent expenditures" as defined in KRS 121.150(1). This report shall be made by a permanent committee, inaugural committee, or contributing organization to the registry on the last day of the first calendar quarter following the registration of the committee with the registry and on the last day of each succeeding calendar quarter until such time as the committee terminates. A contributing organization shall file a report of contributions received and expenditures made on forms prescribed by the registry not later than the last day of each calendar quarter in which contributions are received or expenditures are made. All reports to the registry shall be

postmarked not later than five (5) days after each filing deadline; and

(b) A permanent committee, except a federally-registered out-of-state permanent committee, shall pay an administrative fee to the registry in an amount equal to five percent (5%) of the contributions, including independent expenditures, the permanent committee makes in support of or opposition to all candidates or slates of candidates for office. The payment for the administrative fee shall accompany each report a permanent committee makes to the registry which documents contributions and independent expenditures in support of or defeat of any candidate or slate of candidates during the reporting period covered by the report. The amount of administrative fees received by the registry from permanent committees for each reporting period shall be transferred to the State Treasurer for deposit in the election campaign fund established by KRS 121A.020.

(7) If the final statement of a candidate, campaign committee, or political issues committee shows an unexpended balance of contributions, continuing debts and obligations, or an expenditure deficit, the campaign treasurer shall file with the registry a supplemental statement of contributions and expenditures not more than thirty (30) days after the deadline for filing the final statement. Subsequent supplemental statements shall be filed annually, to be

in the hands of the registry or postmarked not later than ten (10) days after November 1 of each year, until the account shows no unexpended balance, continuing debts and obligations, expenditures, or deficit, or until the year before the candidate sealed to appear on the ballot for the same office for which the funds in the campaign account were originally contributed, in which case the candidate shall file the supplemental annual report not later than ten (10) days after November 1 of that year or at the end of the first calendar quarter of that year after the candidate files his nomination papers for the next year's primary or regular election. All contributions shall be subject to KRS 121.150.

(8) All reports filed under the provisions of this chapter shall be a matter of public record open to inspection by any member of the public immediately upon receipt of the report by the registry. A duplicate copy of each report filed with the registry shall be filed by the candidate, slate of candidates, or committee with county clerk in the county in which the candidate or persons running as a slate of candidates reside at the same time. County clerks shall maintain these reports for public inspection for a period of one (1) year from the date the last report is required to be filed.

(9) A candidate or slate of candidates is relieved of the duty personally to file reports and keep records of receipts and expenditures if the candidate or slate states in writing or on forms provided by the registry that:

(a) Within five (5) business days after personally receiving any contributions, the candidate or slate of candidates shall surrender possession of the contributions to the treasurer of their principal campaign committee without expending any of the proceeds thereof. No

contributions shall be commingled with the candidate's or slated candidates' personal funds or accounts. Contributions received by check, money order, or other written instrument shall be endorsed directly to the campaign committee and shall not be cashed or redeemed by the candidate;

(b) The candidate or slate of candidates shall not make any unreimbursed expenditures for the campaign, except that this paragraph does not preclude a candidate or slate from making an expenditures from personal funds to the designated principal campaign committee, which shall be reported by the committee as a contribution received; and

(c) The waiver shall continue in effect as lons as the candidate or slate of candidates complies with the conditions under which it was granted.

(10) No candidate, slate of candidates, campaign committee, political issues committee, or contributing organization shall use or permit the use of contributions or funds solicited or received for the person or in support of or opposition to a public issue which will appear on the ballot to further the candidacy of the person for a different public office, to support or oppose a different public issue, or to further the candidacy of any person for public office; except that nothing in this subsection shall be deemed to prohibit a candidate or slate of candidates from using funds in the campaign account to purchase admission tickets for any fundraising event or testimonial affair for another candidate or slate of candidates if the amount of the purchase does not exceed on hundred dollars ($100) per event or affair. Any funds or contributions solicited or received by or

on behalf of a candidate, slate of candidates, or any committee, which has been organized in whole or in part to further any candidacy for the same person or to support or oppose the same public issue, shall be deemed to have been solicited or received for the current candidacy or for the election on the public issue if the funds or contributions are solicited or received at any time prior to the regular election for which the candidate, slate of candidates, or public issue is on the ballot. Except as provided in KRS 121A.080(6), any unexpended balance of funds not otherwise obligated for the payment of expenses incurred to further a political issue or the candidacy or a person shall, in whole or in part, at the election of the candidate or committee, escheat to the State Treasury, be returned pro rata to all contributors, or, in the case of a partisan candidate, be transferred to the state or county executive committee of the political party of which the candidate is a member except that a candidate, committee, or an official may retain the funds to further the same public issues or to seek election to the same office or may donate the funds to any charitable, nonprofit, or educational institution recognized under Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended, and any successor thereto.

(11) Any publisher or newspapers or magazines, owner or lessor of billboards, a radio or television station or network, or any other person, company, corporation, or business organization offering its communications or advertising services for hire to the public who receives funds for the purchase of advertising services or material shall file with the registry a copy of the material or communication purchased by any person to support or oppose any slate of candidates or committee, which shall be provided by the purchaser

for filing with the registry, and a copy of the receipt for the funds paid, and shall identify for the registry the person purchasing the services or material, and the source of the funds used to make the purchase if different than the purchaser. The information shall be reported to the registry not more than thirty (30) days after receiving the initial advertising or communications purchase for an election and every thirty (30) days thereafter if purchases are made in the ensuing period; except that reports of purchases shall be made to the registry every fourteen (14) days during the fifty-six (56) days before the primary and regular elections for Governor and Lieutenant Governor. The provisions of this subsection shall apply only to purchases of advertising services or material to support or oppose a slate of candidates for election to the offices of Governor and Lieutenant Governor.

(Enact. Acts 1974, ch. 130, § 190; 1976, ch. 247, § 15; 1976, ch. 279, § 1; 1978, ch. 5, § 2, effective June 17, 1978; 1978, ch. 216, § 1, effective June 17, 1978; 1978, ch. 255, § 2, effective June 17, 1978; 1978, ch. 384, § 255, effective June 17, 1978; 1980, ch. 292, § 8, effective July 15, 1980; 1984, ch. 111, § 70, effective July 13, 1984; 1986, ch. 100, § 7, effective July 15, 1986; 1988, ch. 15, § 2, effective July 15, 1988; 1990, ch. 204, § 1, effective July 13, 1990; 1992, ch. 288, § 28, effective July 14, 1992; 1993, (1st Ex. Sess.), ch. 4, § 60, effective September 16, 1993; 1994, ch. 458, § 12, effective July 15, 1994.)

Compiler's Notes. Section 62 of Acts 1992, ch. 288, provides: "The provisions of Section 25 [KRS 121.150] and subsection (6)(b) of Section 28 [KRS 121.180] of this Act relating to limitations on contributions and administrative fees on contributions to candidates by permanent committees, shall fist apply to elections held and contributions made, respectively, after January 1, 1993.

Subject to the limitations of subsection (6) of Section 8 [KRS 121.180] of this act, the balance a candidate has in his campaign account as of December 31, 1992 shall not be subject to the limitations of Section 25 [KRS 121.150] of this Act and may be used for future campaign expenses."

Section 501(c)(3) of the United States Internal Revenue Code of 1986 referred to in subsection (10) is compiled as 25 U.S.C. § 501(c)(3).

Section 88(1) of Acts 1993 (1st Ex. Sess.), Ch. 4 provided that subsecitons (2) and (3) of KRS 121.180 would become effective on November 3, 1993; however, Section 88(2) provided that "notwithstanding the provisions of subsection (1)," KRS 121.180 (2) and (3) "as amended by this Act shall not apply to the primary and regular elections held in 1993".

Section 89 of Acts 1993 (1st Ex. Sess.), Ch. 4 provided that subseciton (6) of KRS 121.180 would become effective on January 1, 1994.

Section 90 of Acts 1993 (1st Ex. Sess.), Ch. 4 provided that subsection (1) of KRS 121.180 would become effective February 18, 1993.

§ 121.190. Identification of contributors and advertisers.

(1) All newspapers or magazine advertising, posters, circulars, billboards, handbills, sample ballots, and paid-for television or radio announcements with references to or intended for, the support or defeat of a candidate, slate of candidates, or group of candidates for nomination or election to any public office shall be identified by the words "paid for by" followed by the name and address of the payer, or the committee, organization, or association and its treasurer, on whose behalf the communication appears; except that if paid for by a candidate, slate

of candidates, or campaign committee, whichever is applicable. For television and radio broadcasts, compliance with Federal Communications Commission regulations regarding sponsored programs and broadcasts by candidates for public office shall be considered compliance with this section.

(2) The management of newspapers and magazines shall keep a one (1) year record of all statements, articles, or advertisements referred to in subsection (1) of this section, that appear in their publications, however, nothing in subsection (1) of this section shall be construed to require editors or editorial writers of newspapers and magazines to identify themselves in the manner therein required with any article or editorial written by them as part of their duties as an employee or employer.

(Enact. Acts 1974, ch. 130, § 191; 1994, ch. 458, § 13, effective July 15, 1994.)

CHAPTER 121A
PUBLIC FINANCING CAMPAIGN ACT

SECTION.

121A.005. Short title for chapter.
121A.010. Definitions for chapter.
121A.020. Election campaign fund - Transfers.
121A.030. Campaign expenditure limitations.
121A.040. Statement of intent.
121A.050. Contribution limits.
121A.060. Certification of qualification to receive transfer from fund.
121A.070. Deposit of transferred funds - Duty of campaign treasurer.

121A.080. Amounts transferred from fund.
121A.090. Recipients of transfers subject to KRS Chapter 121.
121A.100. Televised candidate forums or debates.
121A.110. Misuse of transferred funds prohibited.

PENALTIES

121A.990. Penalties.

§ 121A.005. Short title for chapter.

This chapter shall be known as the "Public Financing Campaign Act."
(Enact. Acts 1992, ch. 288, § 13, effective July 14, 1992.)

§ 121A.010. Definitions for chapter.

As used in this chapter, unless the context requires otherwise:

(1) "Registry" means the Kentucky Registry of Election Finance;

(2) "Fund" means the election campaign fund;

(3) "Transfer" means a transfer from the fund to a qualifying slate of candidates;

(4) "Qualifying contribution" means a contribution made to a slate of candidates for Governor and Lieutenant Governor by a natural person, permanent committee, executive committee of a political party, or contributing organization that is authorized to contribute to candidates that is paid by personal check, cashier's check, or money order. A qualifying contribution shall not include a cash contribution, loan, pledge, nonmonetary contribution, or contribution by a slate of candidates in excess of the contribution limits of KRS 121A.050;

(5) "Qualifying slate of candidates" means any slate of candidates of a political party or any independent nominees for Governor and Lieutenant Governor whose names are qualified to appear jointly on a primary or runoff primary election ballot, or candidates who have filed a notification and declaration pursuant to KRS 118.127 who are authorized by this chapter to receive contributions and make expenditures jointly for the regular election, and one (1) that has otherwise qualified under this chapter to receive a transfer from the election campaign fund, including having raised the minimum threshold qualifying amount. "Qualifying slate of candidates," when applied to a runoff primary, means a slate of candidates for Governor and Lieutenant Governor that has been certified by the Secretary of State as one that has received the highest or next highest number of votes for its party's nomination in a primary that filed a statement of intent to accept a transfer from the fund and abide by the expenditure limit for the primary which was not rescinded in a timely manner;

(6) "Slate of candidates" means any two (2) persons who have filed a joint notification and declaration pursuant to KRS 118.127, received contributions or made expenditures, appointed a campaign treasurer, designated a campaign depository, or given their consent for any other individual to receive contributions or make expenditures, with a view to bringing about their nomination for election to the offices of Governor and Lieutenant Governor. Unless the context requires otherwise, any provision of law that applies to a candidate shall also apply to a slate of candidates;

(7) "Candidate campaign account" means the bank account required by KRS 121.160 to be established, which for a slate of candidates for Governor and

Lieutenant Governor shall be in a financial institution authorized to do business in Kentucky which is insured by the Federal Deposit Insurance Corporation and shall be for the sole purpose of receiving transfers from the fund and contributions or other moneys raised from personal resources;

(8) "Campaign expenditures" means lawful expenditures from a candidate campaign account on behalf of a slate of candidates to further its nomination or election to the offices of Governor and Lieutenant Governor authorized by the campaign committee treasurer or other authorized individual;

(9) "Committee" includes the following:

(a) "Campaign committee" which means one (1) or more persons who receive contributions and make expenditures to support or oppose one (1) or more specific slate of candidates for nomination or election to the offices of Governor and Lieutenant Governor;

(b) "Political issues committee," which means three (3) or more persons joining together to advocate or oppose a constitutional amendment or public question which will appear on the ballot if that committee receives or expends money in excess of one thousand dollars ($1,000);

(c) "Permanent committee," which means a group of individuals, including an association, committee, or organization, other than a campaign committee or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose political activity which may include support of or opposition to selected candidates, political parties, or issues of public importance, and which functions on a regular basis throughout the year; and

(d) An executive committee of a political party;

(10) "Contributing organization" means a group which merely contributes to candidates, campaign committee, or executive committee from time to time from funds derived solely from within the group, and which does not solicit or receive funds from sources outside the group itself. However, any contribution made by a contributing organization in excess of one hundred dollars ($100) shall be reported to the registry;

(11)

(a) "Contribution" means any:

1. Payment, distribution, loan, deposit, or gift of money or other thing of value, to a slate of candidates, its agent, a committee, or contributing organization. As used in this subsection, "loan" shall include a guarantee, endorsement, or other form of security where the risk of nonpayment rests with the surety, guarantor, or endorser, as well as with a committee, contributing organization, slate of candidates, or other primary obligor. No individual shall become liable as surety, endorser, or guarantor for any sum which, when combined with all other contributions the individual makes to the slate of candidates, its agent, the committee, or the contributing organization, exceeds the contribution limits provided in KRS 121.150;

2. Payment by any individual other than the slate of candidates, its authorized treasurer, a committee, or contributing organization of compensation for the

personal services of another individual which are rendered to a slate of candidates, committee, or contributing organization;

3. Goods, advertising, or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are furnished to a slate of candidates, committee, or contributing organization without charge, or at a rate which is less than the rate normally charges for such goods or services, if the person furnishing the goods, advertising, or services paid another person for their provision;

4. Payment by an individual other than the slate of candidates, its authorized treasurer, a committee, or contributing organization for any goods or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are utilized by a slate of candidates, committee, or contributing organization, if the person making the payment paid another person for their utilization;

5. Expenditure in connection with any other activity undertaken independently of activities of a slate of candidates, of a committee, or of a contributing organization made or furnished for the purpose of influencing the results of an election.

(b) Notwithstanding the foregoing meanings of "contribution," it shall not be construed to include:

1. Services provided without compensation by individuals volunteering a portion or all of their time on behalf of a slate of candidates, committee, or contributing organization;
2. Expenditures by an individual other than a candidate in connection with an event held in the individual's home when the individual expends less than three hundred dollars ($300); or
3. A loan of money by any financial institution doing business in Kentucky made in accordance with applicable banking laws and regulations and in the ordinary course of business; and

(12) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or should have been aware that his conduct is of that nature or that the circumstance exists.

(Enact. Acts 1992, ch. 288, § 1, effective July 14, 1992; 1994, ch, 458, § 15, effective July 15, 1994.)

§ 121A.050. Contribution limits.

(1) A slate of candidates that has filed a statement of intent to accept transfers from the fund and abide by the maximum expenditure limit which was not rescinded pursuant to KRS 121A.040(4) shall not knowingly accept a contribution from a natural person, permanent committee, executive committee of a political party, or contributing organization of more than five hundred dollars ($500) in any one (1) election. Except for independent expenditures, as defined in KRS 121.150(1), no natural person, permanent committee, executive committee of a

political party, or contributing organization shall knowingly make a contribution of more than five hundred dollars ($500) in any one (1) election to a slate of candidates that has filed a statement of intent to accept transfers from the fund and abide by the maximum expenditure limit which was not rescinded.

(2) A slate of candidates that has filed a statement of intent to reject transfers from the fund and not abide by the maximum expenditure limit or one that has rescinded a statement of intent to accept transfers from the fund pursuant to KRS 121A.040(4) shall not knowingly accept a contribution of more than one hundred dollars ($100) in any one (1) election from a natural person, permanent committee, executive committee of a political party, or contributing organization. A slate of candidates that has accepted a contribution in excess of one hundred dollars ($100) that later rejects expenditure limitations or rescinds its acceptance of expenditure limitations shall refund to the contributor the amount of a contribution in excess of one hundred dollars ($100). Except for independent expenditures, as defined in KRS 121.150(1), no natural person, permanent committee, executive committee of a political party, or contributing organization shall knowingly make a contribution of more than one hundred dollars ($100) in any one (1) election to a slate of candidates that has filed a statement of intent to reject transfers from the fund and not abide by the maximum expenditure limit or one that has rescinded a statement of intent to accept transfers from the fund.

(3) No slate of candidates shall knowingly accept any cash contribution from a natural person, permanent committee, executive committee of a political party, or contributing organization. No natural person, permanent committee, executive committee of a political party, or contributing organization shall

knowingly make a cash contribution to a slate of candidates.

(Enact. Acts 1992, ch. 288, § 5, effective July 14, 1992.)

GENERAL ASSEMBLY
COMMONWEALTH OF KENTUCKY

REGULAR SESSION 1996

HOUSE BILL NO. 130
AS ENACTED

MONDAY, MARCH 25, 1996

AN ACT relating to campaign finance.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 121A.020 is amended to read as follows:

(1) There is established a special account of the general fund in the State Treasury to be known as the election campaign fund from which funds may be paid only upon warrants issued by the registry.

(2) The registry shall distribute transfers for the matching of qualifying contributions to a qualifying slate of candidates for Governor and Lieutenant Governor as provided in KRS 121A.080. The transfers shall be paid from moneys derived from appropriations made to the fund for that purpose and moneys transferred to the fund pursuant to KRS 121A.080(6), 121.170(5), 121.180(6)(b), and 118.255(3).

(3) The registry shall report to the General Assembly within three (3) months following an election for Governor and Lieutenant Governor the total amount of transfers from the fund paid to each qualifying slate of candidates for qualifying contributions.

(4) The registry shall preserve all receipted bills and accounts required to be kept by this chapter for a period of six (6) years.

(5) In lieu of the reporting provisions of KRS 121.180(3)(b)1., 2., and 3., all slated candidates' campaign committees, including those of slates of candidates rejecting expenditure limitations, and fundraisers for slated candidates who are registered pursuant to KRS 121.170(2), shall report all contributions and expenditures to the registry not later than five (5) days after the last day of the calendar month following the formation and registration of the committee or registration of the fundraiser and not later than five (5) days after the last day of each calendar month thereafter until the fifty-six (56) days immediately preceding the primary ***and*** ~~[election and the fifty-six (56) days immediately preceding the]~~ regular election of a year in which a Governor and Lieutenant Governor are elected when reports shall be ***filed not later than three (3) days after the fifty-sixth, forty-second, twenty-eighth, and***

* * *

carried forward from one (1) election cycle to another shall not be considered in calculating the acceptable percentage or dollar amount of contributions which may be accepted from permanent committees for the election cycle for which the funds are carried forward. A candidate may, without penalty, contribute funds to his campaign account not later than twenty (20) days following the election cycle so as not to exceed the permitted percentage or dollar amount of contributions which may be accepted from permanent committees or the candidate may, not later than twenty (20) days after the end of the election cycle, refund any excess permanent committee contributions on a pro rata basis to the permanent

committees whose contributions are accepted after the aggregate limit has been reached.

(26) No candidate or slate of candidates for any office in this state shall accept a contribution, including an in-kind contribution, which is made from funds in a federal campaign account. No person shall make a contribution, including an in-kind contribution, from funds in a federal campaign account to any candidate or slate of candidates for any office in this state.

Section 4. KRS 121.015 is amended to read as follows.

As used in this chapter:

(1) "Registry" means the Kentucky Registry of Election Finance;

(2) "Election" means any primary, runoff primary, regular, or special election to fill vacancies regardless of whether a candidate or slate of candidates is opposed or unopposed in an election. Each primary, runoff primary, regular, or special election shall be considered a separate election;

(3) "Committee" includes the following:

(a) "Campaign committee," which means one (1) or more persons who receive contributions and make expenditures to support or oppose one (1) or more specific candidates or slates of candidates for nomination or election to any state, county, city, or district office;

(b) "Political issues committee," which means three (3) or more persons joining together to advocate or oppose a constitutional amendment or public question which appears on the ballot if that committee receives or expends money in excess of one thousand dollars ($1,000);

(c) "Permanent committee," which means a group of individuals, including an association, committee or organization, other than a campaign committee, political issues committee, inaugural committee, or party executive committee, which is established as, or intended to be a permanent organization having as a primary purpose *expressly advocating the election or defeat of one (1) or more clearly identified* ~~[political activity which may include support of or opposition to selected]~~ candidates, slates of candidates, *or* political parties, ~~[or issues of public importance, and]~~ which functions on a regular basis throughout the year;

(d) An executive committee of a political party; and

(e) "Inaugural committee," which means one (1) or more persons who receive contributions and make expenditures in support of inauguration activities for any candidate or slate of candidates elected to any state, county, city, or district office;

(4) "Contributing organization" means a group which merely contributes to candidates, campaign committees, or executive committees from time to time from funds derived solely from within the group, and which does not solicit or receive funds from sources outside the group itself. However, any contributions made by the groups in excess of one hundred dollars ($100) shall be reported to the registry;

(5) "Testimonial affair" means an affair held in honor of a person who holds or who is or was a candidate for nomination or election to a political office in this state designed to raise funds for any purpose not charitable, religious, or educational;

(6) "Contribution" means any:

(a) Payment, distribution, loan, deposit, or gift of money or other thing of value, to a candidate, his agent, a slate of candidates, its authorized agent, a committee, or contributing organization. As used in this subsection, "loan" shall include a guarantee, endorsement, or other form of security where the risk of nonpayment rests with the surety, guarantor, or endorser, as well as with a committee, contributing organization, candidate, slate of candidates, or other primary obligor. No person shall become liable as surety, endorser, or guarantor for any sum in any one (1) election which, when combined with all other contributions the individual makes to a candidate, his agent, a slate of candidates, its agent, a committee, or a contributing organization, exceeds the contribution limits provided in KRS 121A.050 or KRS 121.150;

(b) Payment by any person other than the candidate, his authorized treasurer, a slate of candidates, its authorized treasurer, a committee, or a contributing organization, of compensation for the personal services of another person which are rendered to a candidate, slate of candidates, committee, or contributing organization, or for inauguration activities;

(c) Goods, advertising, or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are furnished to a candidate, slate of candidates, committee, or contributing organization or for inauguration activities without charge, or at a rate which is less than the rate normally charged for the goods or services, ***or***

(d) Payment by any person other than a candidate, his authorized treasurer, a slate of candidates, its authorized treasurer, a committee, or contributing organization for any goods or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are utilized by a candidate, slate of candidates, committee, or contributing organization, or for inauguration activities; ~~[or~~

~~(e) Expenditure in connection with any other activity undertaken independently of the activities of a candidate, slate of candidates, committee, or contributing organization made or furnished for the purpose of influencing the results of an election;]~~

(7) Notwithstanding the foregoing meanings of "contribution," the word shall not be construed to include:

(a) Services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate, committee, or contributing organization;~~[or]~~

(b) A loan of money by any financial institution doing business in Kentucky made in accordance with applicable banking laws and regulations and in the ordinary course of business; ***or***

(c) An independent expenditure by any individual or permanent committee;

(8) "Candidate" means any person who has received contributions or made expenditures, has appointed a campaign treasurer, or has given his consent for any other person to receive contributions or make expenditures with a view to bringing about his nomination or election to public office, except federal office;

(9) "Slate of candidates" means any two (2) persons who have filed a joint notification and declaration pursuant to KRS 118.127, received contributions or made expenditures, appointed a campaign treasurer, designated a campaign depository, or given their consent for any other person to receive contributions or make expenditures with a view to bringing about their nomination for election to the offices of Governor and Lieutenant Governor. Unless the context requires otherwise, any provision of law that applies to a candidate shall also apply to a slate of candidates;

(10) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or should have been aware that his conduct is of that nature or that the circumstance exists;~~[and]~~

(11) "Fundraiser" means an individual who directly solicits and secures contributions on behalf of a candidate or slate of candidates for a statewide-elected state office or an office in a jurisdiction with a population in excess of two hundred thousand (200,000) residents; *and*

(12) "Independent expenditure" means the expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them.

Section 5: KRS 121.035 is amended to read as follows:

(1) No corporation organized or authorized to do business in this state or in another state shall, by itself or by or through an officer, agent, attorney, or employee, subscribe, give, procure or furnish, or afterwards reimburse or compensate in any way any person who has subscribed, given, procured, or furnished, any money, privilege, favor, or other thing of value to any political or quasi-political organization, or any officer or member thereof to be used by such organization for the purpose of aiding, assisting, or advancing any candidate for public office in this state in any way whatever.

(2) No officer, agent, attorney, or employee of any corporation organization or authorized to do business in this state or in another state, or person acting for or representing any such corporation, shall disburse, distribute, pay out, or in any way handle any money, funds, or other thing of value that belongs to or has been or is being furnished by any such corporation or any officer, agent, attorney, or employee thereof to be used or employed in any way for the purpose of aiding, assisting, or advancing any candidate for public office in this state in any way whatever.

(3) Nothing in this section shall be construed to prohibit a corporation from making contributions in support of a *constitutional amendment a public question which appears on the ballot, or* position on an issue of public importance. *Nothing in this chapter shall be construed to prohibit a not-for-profit corporation which does not derive a substantial portion of its revenue from for-profit corporation, which does not derive a substantial portion of its revenue from for-profit corporations from making independent expenditures.*

Section 6. KRS 121.170 is amended to read as follows:

(1) Any committee, except a federally-registered out-of-state permanent committee, organized under any provisions of this chapter shall register with the registry, by filing official notice of intention at the time of organization, giving names, addresses, and positions of the officers of the organization and designating the candidate or candidates, slate of candidates, or question it is organized to support or oppose on forms prescribed by the registry, except that no campaign committee for a slate of candidates for Governor and Lieutenant Governor shall be registered prior to the filing of a joint notification and declaration by the slate of candidates pursuant to KRS 118.125 and 118.127. The name of the committee shall reasonably identify to the public the sponsorship and purpose of the committee. The forms filed with the registry shall require the registrant to clearly identify the specific purpose, sponsorship, and source from which the committee originates, and the registry shall refuse to allow filing by any committee until this requirement has been satisfied.

(2) Any person who acts as a fundraiser by directly soliciting contributions for an election campaign of a candidate or slate of candidates for statewide-elected state office or an office in a jurisdiction containing in excess of two hundred thousand (200,000) residents shall register with the registry when he raises in excess of three thousand dollars ($3,000) in any one (1) election for the campaign committee by

* * *

the same office or may donate the funds to any charitable, nonprofit, or educational institution

recognized under Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended, and any successor thereto.

(11) Any publisher of newspapers or magazines, owner or lessor of billboards, a radio or television station or network, or any other person, company, corporation, or business organization offering its communications or advertising services for hire to the public who receives funds for the purchase of advertising services or material shall file with the registry a copy of the material or communication purchased by any person to support or oppose any slate of candidates or committee, which shall be provided by the purchaser for filing with the registry, and a copy of the receipt for the funds paid, and shall identify for the registry the person purchasing the services or material, and the source of the funds used to make the purchase if different than the purchaser. The information shall be reported to the registry not more than thirty (30) days after receiving the initial advertising or communications purchase for an election and every thirty (30) days thereafter if purchases are made in the ensuing period; except that reports of purchases shall be made to the registry every fourteen (14) days during the fifty-six (56) days before the primary and regular elections for Governor and Lieutenant Governor. The provisions of this subsection shall apply only to purchases of advertising services or material to support or oppose a slate of candidates for election to the offices of Governor and Lieutenant Governor.

Section 8. KRS 121.190 is amended to read as follows:

(1) All newspaper or magazine advertising, posters, circulars, billboards, handbills, sample ballots, and

paid-for television or radio announcements *which expressly advocate the election or defeat of a clearly identified* ~~[with reference to or intended for, the support or defeat of a]~~ candidate, slate of candidates, or group of candidates for nomination or election to any public office shall be identified by the words "paid for by" followed by the name and address of the *individual or committee which paid for the communication* ~~[payer, or the committee, organization, or association and its treasurer, on whose behalf the communication appears]~~; except that if paid for by a candidate, slate of candidates, or campaign committee, it shall be identified only by the words "paid for by" followed by the name of the candidate, slate of candidates, or campaign committee, whichever is applicable. For television and radio broadcasts, compliance with Federal Communications Commission regulations regarding sponsored programs and broadcasts by candidates for public office shall be considered compliance with this section.

(2) The management of newspapers and magazines shall keep a one (1) year record of all statements, articles, or advertisements referred to in subsection (1) of this section, that appear in their publications, however, nothing in subsection (1) of this section shall be construed to require editors or editorial writers of newspapers and magazines to identify themselves in the manner therein required with any article or editorial written by them as a part of their duties as an employee or employer

Section 9. KRS 121.990 is amended to read as follows:

(1) Any corporation or any officer, agent, attorney, employee of a corporation, who knowingly violates

any of the provisions of KRS 121.025, shall be fined not more than ten thousand dollars ($10,000), and, in the case of individuals, be guilty of a Class D felony.

(2) Any corporation that knowingly violates any of the provisions of KRS 121.035(1) or KRS 121.310(2) shall be fined not more than ten thousand dollars ($10,000) for each offense, and upon conviction its charter shall be forfeited or its authority to do business revoked.

(3) Any person who knowingly violates any of the provisions of KRS 121.035(2), 121.045, 121.055, 121.150 to 121.230, 121.310(1), 121.320, or KRS Chapter 121A, shall, for each offense, be guilty of a Class D felony. Violations of KRS 121.150 to 121.230 or KRS Chapter 121A shall include, but shall not be limited to,

* * *

(b) Any immediate family member, employer, or employee of a fundraiser who knowingly receives a nonbid contract, lease, or appointment to an office or board in violation of KRS 121.330(4) shall be guilty of a Class D felony; and

(c) Upon conviction, the nonbid contract, lease, or appointment shall be canceled, and the person or entity convicted shall be ineligible to receive a nonbid contract, lease, or appointment with a governing authority for a period of five (5) years from the date of a final judicial determination of guilt.

(18) Any appointed or elected state office holder or any other person who knowingly violates the provisions of KRS 121.120(5) shall be guilty of a Class D felony. In the event a candidate has assumed office, upon a final judicial determination of guilt, his office

shall be declared vacant and he shall forfeit all benefits which he would have been entitled to receive had he continued to serve.

(19) Any person who knowingly violates the provisions of KRS 121.065(1) shall be guilty of a Class A misdemeanor.

Section 10. KRS 121A.010 is amended to read as follows:

As used in this chapter, unless the context requires otherwise:

(1) "Registry" means the Kentucky Registry of Election Finance;

(2) "Fund" means the election campaign fund;

(3) "Transfer" means a transfer from the fund to a qualifying slate of candidates;

(4) "Qualifying contribution" means a contribution made to a slate of candidates for Governor and Lieutenant Governor by a natural person, permanent committee, executive committee of a political party, or contributing organization that is authorized to contribute to candidates that is paid by personal check, cashier's check, or money order. A qualifying contribution shall not include a cash contribution, loan, pledge, nonmonetary contribution, or contribution by a slate of candidates in excess of the contribution limits of KRS 121A.050;

(5) "Qualifying slate of candidates" means any slate of candidates of a political party or any independent nominees for Governor and Lieutenant Governor whose names are qualified to appear jointly on a primary or runoff primary election ballot, or candidates who have filed a notification and declaration pursuant to KRS 118.127 who are authorized by this chapter to receive contributions

and make expenditures jointly for the regular election, and one (1) that has otherwise qualified under this chapter to receive a transfer from the election campaign fund, including having raised the minimum threshold qualifying amount. "Qualifying slate of candidates," when applied to a runoff primary, means a slate of candidates for Governor and Lieutenant Governor that has been certified by the Secretary of State as one that has received the highest or next highest number of votes for its party's nomination in a primary that filed a statement of intent to accept a transfer from the fund and abide by the expenditure limit for the primary which was not rescinded in a timely manner;

(6) "Slate of candidates" means any two (2) persons who have filed a joint notification and declaration pursuant to KRS 118.127, received contributions, or made expenditures, appointed a campaign treasurer, designated a campaign depository, or given their consent for any other individual to receive contributions or make expenditures, with a view to bringing about their nomination for election to the offices of Governor and Lieutenant Governor. Unless the context requires otherwise, any provision of law that applies to a candidate shall also apply to a slate of candidates;

(7) "Candidate campaign account" means the bank account required by KRS 121.160 to be established, which for a slate of candidates for Governor and Lieutenant Governor shall be in a financial institution authorized to do business in Kentucky which is insured by the Federal Deposit Insurance Corporation and shall be for the sole purpose of receiving transfers from the fund and contributions or other moneys raised from personal resources;

(8) "Campaign expenditures" means lawful expenditures from a candidate campaign account on behalf of a

slate of candidates to further its nomination or election to the offices of Governor and Lieutenant Governor authorized by the campaign committee treasurer or other authorized individual;

(9) "Committee" includes the following:

(a) "Campaign committee" which means one (1) or more persons who receive contributions and make expenditures to support or oppose one (1) or more specific slate of candidates for nomination or election to the offices of Governor and Lieutenant Governor;

(b) "Political issues committee," which means three (3) or more persons joining together to advocate or oppose a constitutional amendment or public question which will appear on the ballot if that committee receives or expends money in excess of one thousand dollars ($1,000);

(c) "Permanent committee" which means a group of individuals, including an association, committee, or organization, other than a campaign committee or party executive committee, which is established as, or intended to be a permanent organization having as a primary purpose *expressly advocating the election or defeat of one (1) or more clearly identified* ~~[political activity which may include support of or opposition to selected]~~ candidates, *slates of candidates, or* political parties ~~[,or issues of public importance,]~~ and which functions on a regular basis throughout the year; and

(d) An executive committee of a political party;

(10) "Contributing organization" means a group which merely contributes to candidates, campaign committees, or executive committees from time to time from funds derived solely from within the

group, and which does not solicit or receive funds from sources outside the group itself. However, any contribution made by a contributing organization in excess of one hundred dollars ($100) shall be reported to the registry;

(11) (a) "Contribution" means any:

1. Payment, distribution, loan, deposit, or gift of money or other thing of value, to a slate of candidates, its agent, a committee, or contributing organization. As used in this subsection, "loan" shall include a guarantee, endorsement, or other form of security where the risk of nonpayment rests with the surety, guarantor, or endorser, as well as with a committee, contributing organization, slate of candidates, or other primary obligor. No individual shall become liable as surety, endorser, or guarantor for any sum which, when combined with all other contributions the individual makes to the slate of candidates, its agent, the committee, or the contributing organization, exceeds the contribution limits provided in KRS 121.150;
2. Payment by any individual other than the slate of candidates, its authorized treasurer, a committee, or contributing organization of compensation for the personal services of another individual which are rendered to a slate of candidates, committee, or contributing organization;
3. Goods, advertising, or services with a value of more than one hundred

dollars ($100) in the aggregate in any one (1) election which are furnished to a slate of candidates, committee, or contributing organization without charge, or at a rate which is less than the rate normally charged for such goods or services, if the person furnishing the goods, advertising or services paid another person for their provision; *or*

4. Payment by any individual other than the slate of candidates, its authorized treasurer, a committee, or contributing organization for any goods or services with a value of more than one hundred dollars ($100) in the aggregate in any one (1) election which are utilized by a slate of candidates, committee, or contributing organization, if the person making the payment paid another person for their utilization ~~[;~~

~~5. Expenditure in connection with any other activity undertaken independently of activities of a slate of candidates, of a committee, or of a contributing organization made or furnished for the purpose of influencing the results of an election].~~

(b) Notwithstanding the foregoing meanings of "contribution," it shall not be construed to include:

1. Services provided without compensation by individuals volunteering a portion or all of their time on behalf of a slate of candidates, committee, or contributing organization;

2. Expenditures by an individual other than a candidate in connection with an event held in the individual's home when the individual expends less than three hundred dollars ($300); ~~[or]~~

3. A loan of money by any financial institution doing business in Kentucky made in accordance with applicable banking laws and regulations and in the ordinary course of business; *or*

4. An independent expenditure by any individual or permanent committee, ~~[and]~~

(12) "Knowingly" means with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or should have been aware that his conduct is of that nature or that the circumstance exists; *and*

(13) "Independent expenditure" means the expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of

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GENERAL ASSEMBLY
COMMONWEALTH OF KENTUCKY

REGULAR SESSION 1996

HOUSE BILL NO. 695
AS ENACTED

TUESDAY, MARCH 26, 1996

AN ACT relating to campaign contributions.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. KRS 121.150 is amended to read as follows:

(1) No contribution of money or other thing of value, nor obligation therefor, shall be made or received, and no expenditure of money or other thing of value shall be made or incurred, directly or indirectly, other than an "independent expenditure." to support inauguration activities or to support or defeat a candidate, slate of candidates, constitutional amendment or public question which will appear on the ballot in an election, except through the duly appointed campaign manager, or campaign treasurer of the candidate, slate of candidates, or registered committee. As used in this section, "independent expenditure" means one made for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, or the passage or defeat of a constitutional amendment or public question which will appear on the ballot and which is not made with any direct or indirect cooperation, consent request, suggestion, or consultation involving

a candidate, slate of candidates, campaign committee, political issues committee, or agent. No candidate, slate of candidates, campaign committee, political issues committee, nor anyone acting on their behalf shall have any communication with another person nor anyone on his behalf regarding that person's making of an independent expenditure on behalf of the candidate, slate, or committee prior to the time the independent expenditure is made. Any person making an "independent expenditure", as defined in this subsection, shall report these expenditures when the expenditures exceed five hundred dollars ($500) in the aggregate in any one (1) election, on a form provided by the registry and shall sign a statement on the form, under penalty of perjury, that the expenditure was an actual independent expenditure and that there was no prior communication with the campaign on whose behalf it was made.

(2) Except as provided in KRS 121.180(10), the solicitation from and contributions by candidates, slates of candidates, campaign committees, political issues committees, permanent committees, and party executive committees to any religious, charitable, civic, eleemosynary, or other causes or organizations established primarily for the public good is expressly prohibited; except that it shall not be construed as a violation of this section for a candidate or slate of candidates to continue regular personal contributions to religious, civic, or charitable groups.

(3) No candidate, slate of candidates, committee, or contributing organization, nor anyone acting on their behalf, shall accept any anonymous contribution in excess of fifty dollars ($50), and all anonymous contributions in excess of fifty dollars ($50) shall be returned to the donor, if the donor can be determined. If no donor is found, the contribution shall escheat to the state and be transferred to the election campaign

fund established by KRS 121A.020. No candidate, slate of candidates, committee, or contributing organization, nor anyone acting on their behalf shall accept anonymous contributions in excess of one thousand dollars ($1,000) in the aggregate in any one (1) election. Anonymous contributions in excess of one thousand dollars ($1,000) in the aggregate which are received in any one (1) election shall escheat to the state and be transferred to the election campaign fund established by KRS 121A.020.

(4) No candidate, committee, or contributing organization, nor anyone on their behalf, shall accept a cash contribution in excess of fifty dollars ($50) in the aggregate from each contributor in any one (1) election. No candidate, committee, or contributing organization, nor anyone on their behalf, shall accept a cashier's check or money order in excess of the maximum cash contribution limit unless the instrument clearly identifies both the payor and the payee. A contribution made by cashier's check or money order which identifies both the payor and the payee shall be treated as a contribution made by check for purposes of the contribution limits contained in this section. No person shall make a cash contribution in excess of fifty dollars ($50) in the aggregate in any one (1) election to a candidate, committee, or contributing organization, nor anyone on their behalf.

(5) No candidate, slate of candidates, committee, contributing organization, nor anyone on their behalf, shall accept any contribution in excess of one hundred dollars ($100) from any person who shall not become (18) years of age on or before the day of the next general election.

(6) No candidate, campaign committee, political issues committee, nor anyone acting on their behalf, shall accept a contribution of more than *one thousand*

dollars ($1,000) ~~[five hundred dollars ($500)]~~ from any person, permanent committee, or contributing organization in any one (1) election; except that no candidate for school board, his campaign committee, nor anyone acting on their behalf shall accept a contribution of more than one hundred dollars ($100) from any person or more than two hundred dollars ($200) from any permanent committee or contributing organization in any one (1) election. No person, permanent committee, or contributing organization shall contribute more than *one thousand dollars ($1,000)* ~~[five hundred dollars ($500)]~~ to any one (1) candidate, campaign committee, political issues committee, nor anyone acting on their behalf, in any one (1) election; except that no person shall contribute more than one hundred dollars ($100) and no permanent committee or contributing organization shall contribute more than two hundred dollars ($200) to any one (1) school board candidate, his campaign committee, nor anyone acting on their behalf, in any one (1) election. Limits on contributions for slates of candidates for Governor and Lieutenant Governor which may be made or received in any one (1) election shall be governed by the provisions of KRS 121A.050.

(7) Permanent committees or contributing organizations affiliated by bylaw structure or by registration, as determined by the Registry of Election Finance, shall be considered as one (1) committee for purposes of applying the contribution limits of

* * *

contributions accepted by the candidate in any one (1) election ~~[cycle]~~, or ten ~~[five]~~ thousand dollars ($10,000) ~~[($5,000)]~~ in any one (1) election ~~[(cycle)]~~, whichever is the greater amount. ~~[For the purposes of this subsection, "election cycle" means the period~~

~~between regular elections for the office a candidate seeks.~~] The percentage of the total contributions or dollar amounts of contributions accepted by a candidate in an election ~~[cycle]~~ that is accepted from permanent committees shall be calculated as of the day of each ~~[regular]~~ election ~~[day that ends the election cycle]~~. Funds in a candidate's campaign account which are carried forward from one (1) election ~~[cycle]~~ to another shall not be considered in calculating the acceptable percentage or dollar amount of contributions which may be accepted from permanent committees for the election ~~[cycle]~~ for which the funds are carried forward. A candidate may, without penalty, contribute funds to his campaign account not later than twenty (20) days following the election ~~[cycle]~~ so as not to exceed the permitted percentage or dollar amount of contributions which may be accepted from permanent committees or the candidate may, not later than twenty (20) days after the end of the election ~~[cycle]~~, refund any excess permanent committee contributions on a pro rata basis to the permanent committees whose contributions are accepted after the aggregate limit has been reached.

(26) No candidate or slate of candidates for any office in this state shall accept a contribution, including an in-kind contribution, which is made from funds in a federal campaign, account. No person shall make a contribution, including an in-kind contribution, from funds in a federal campaign account to any candidate or slate of candidates for any office in this state.

Section 2. KRS 121A.050 is amended to read as follows:

(1) A slate of candidates that has filed a statement of intent to accept transfers from the fund and abide by

the maximum expenditure limit which was not rescinded pursuant to KRS 121A.040(4) shall not knowingly accept a contribution from a natural person, permanent committee, executive committee of a political party, or contributing organization of more than *one thousand dollars ($1,000)* ~~[five hundred dollars ($500)]~~ in any one (1) election. Except for independent expenditures, as defined in KRS 121,150(1), no natural person, permanent committee, executive committee of a political party, or contributing organization shall knowingly make a contribution of more than *one thousand dollars ($1,000)* ~~[five hundred dollars ($500)]~~ in any one (1) election to a slate of candidates that has filed a statement of intent to accept transfers from the fund and abide by the maximum expenditure limit which was not rescinded.

(2) A slate of candidates that has filed a statement of intent to reject transfers from the fund and not abide by the maximum expenditure limit or one that has rescinded a statement of intent to accept transfers from the fund pursuant to KRS 121A.040(4) shall not knowingly accept a contribution of more than one hundred dollars ($100) in any one (1) election from a natural person, permanent committee, executive committee of a political party, or contributing organization. A slate of candidates that has accepted a contribution in excess of one hundred dollars ($100) that later rejects expenditure limitations or rescinds its acceptance of expenditure limitations shall refund to the contributor the amount of a contribution in excess of one hundred dollars ($100). Except for independent expenditures, as defined in KRS 121.150(1), no natural person, permanent committee, executive committee or a political party, or contributing organization shall knowingly make a contribution of more than one hundred dollars ($100)

in any one (1) election to a slate of candidates that has filed a statement of intent to reject transfers from the fund and not abide by the maximum expenditure limit or one that has rescinded a statement of intent to accept transfers from the fund.

(3) No slate of candidates shall knowingly accept any cash contribution from a natural person, permanent committee, executive committee of a political party, or

* * *

No._____

In The
Supreme Court of the United States
October Term, 1997

KENTUCKY RIGHT TO LIFE, INC.;
KENTUCKY RIGHT TO LIFE POLITICAL ACTION COMMITTEE, ROBERT ZOELLER; and
LORA ROBERTSON, Treasurer of Kentucky Right To Life Political Action Committee,

Petitioners,

v.

DAVID STENGEL, as Commonwealth's Attorney for Jefferson County, Kentucky,and as a representative of the class of Commonwealth's Attorneys in the State of Kentucky; A.B. CHANDLER, II, as Attorney General of the State of Kentucky; JOSEPH H. TERRY, as Chairman of the Registry of Election Finance of the State of Kentucky; CAROLINE S. BRATT, as a member of the Registry of Election Finance; VICTOR B. MADDOX, as a member of the Registry of Election Finance; GEOFFREY C. RALSTON, as a member of the Registry of Election Finance; WILLIAM T. WARNER, as a member of the Registry of Election Finance; BRENDA W. WILLOUGHBY, as a member of the Registry of Election Finance; BETTY JOE WINTERS, as a member of the Registry of Election Finance, all in their official capacities,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI OF KENTUCKY RIGHT TO LIFE, INC., KENTUCKY RIGHT TO LIFE POLITICAL ACTION COMMITTEE, ROBERT ZOELLER AND LORA ROBERTSON

James Bopp, Jr.
Counsel of Record
John K. Abegg
Bopp, Coleson
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401 Ohio Street
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Counsel for Petitioners

QUESTIONS DEALT WITH HEREIN

1. This Court has stated that when the Government regulates speech, it must factually demonstrate that the harm is real, and that the regulation will actually alleviate it. In this case, Kentucky imposes a $1,500 aggregate limit on contributions to all political action committees (PACs). As a result, it prohibited Petitioner Zoeller from contributing *any* money to Petitioner Kentucky Right To Life Political Action Committee (KRLPAC) because he had already contributed a total of $1,500 to *other* PACs. May Kentucky, consistent with the First and Fourteenth Amendments, completely prohibit Mr. Zoeller from making any contributions to KRLPAC, because he has contributed $1,500 to other PACs, without any evidence or legislative findings that: a) PACs are so inherently corrupting that drastically curtailing - and in some cases completely prohibiting - people from associating with them advances a compelling state interest; and b) it is only employing narrowly tailored means to advance this interest?

2. In *Buckley v. Valeo*, this Court held that the compelling interest which supports restricting contributions is preventing the *quid pro quo* corruption that may result from large, individual contributions to current and potential officeholders. Because this interest is predicated upon *large* contributions to *candidates*, is it constitutional under the First and Fourteenth Amendments for Kentucky to impose a $1,500 aggregate contribution limit to PACs, thereby prohibiting Petitioner Zoeller from making *any* contributions - *not* just large contributions - to Petitioner KRLPAC - a PAC, *not* a candidate?

3. In *Citizens Against Rent Control v. City Of Berkeley*, this Court noted that discriminating against persons simply because they band together to advance their views violates the right to freely associate. Discriminating against certain groups also deprives persons and groups of the equal protection of the laws. In this case, Kentucky has prohibited Mr. Zoeller and KRLPAC from banding together to advance their political views; however, it does not similarly prohibit Mr. Zoeller from banding together either with political parties or with candidates. Has Kentucky thus violated the rights of Mr. Zoeller and KRLPAC to speak, to freely associate and to the equal protection of the laws?

4. This Court has stated that when a case becomes moot pending appeal, the practice is to vacate the judgment below and direct the lower court to dismiss the case; the reason for this practice is so the loser may relitigate the judgment if the case becomes justiciable again. During the appeal to the circuit court in this case, the State amended the language upon which the Plaintiffs below based several of their statutory challenges, thus mooting them. Did the circuit court err by failing to vacate the district court's judgment upholding the prior versions of these statutes so that the Plaintiffs below could challenge these statutes if the State reenacted them?

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CASE NO. 95-6581

In The
United States Court of Appeals
For The Sixth Circuit

KENTUCKY RIGHT TO LIFE, INC.;
KENTUCKY RIGHT TO LIFE POLITICAL ACTION COMMITTEE (KRLPAC); ROBERT ZOELLER; and LORA ROBERTSON, Treasurer of Kentucky Right to Life Political Action Committee;
Plaintiffs - Appellants,

v.

MARC S. MURPHY, in his official capacity as Commonwealth Attorney for Jefferson County, Kentucky, and as a representative of the class of Commonwealth Attorneys in the State of Kentucky;
A.B. CHANDLER, III, in his official capacity as Attorney General for the State of Kentucky;
JOSEPH H. TERRY, in his official capacity as Chairman of the Registry of Election Finance of the State of Kentucky;
CAROLINE S. BRATT, in her official capacity as a member of the Registry of Election Finance;
R. KENT WESTBERRY, in his official capacity as a member of the Registry of Election Finance;
GEOFFREY C. RALSTON, in his official capacity as a member of the Registry of Election Finance;
WILLIAM T. WARNER, in his official capacity as a member of the Registry of Election Finance;
BRENDA W. WILLOUGHBY, in her official capacity as a member of the Registry of Election Finance; and
DONALD L. COX, in his official capacity as a member of the Registry of Election Finance,
Defendants - Appellees,

COMMON CAUSE OF KENTUCKY;
LEAGUE OF WOMEN VOTERS OF KENTUCKY,
Amici Curiae.

REPLY BRIEF FOR APPELLANTS
KENTUCKY RIGHT TO LIFE, INC., et al.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
KENTUCKY AT LOUISVILLE

Counsel listed on reverse of this cover

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ARGUMENT

The Appellees ("the State") assert that "[t]he only issues on this appeal that have not been rendered moot by subsequent legislation are "certain of Appellants' ("KRL") challenges to KRS 121.150(10), 121A.030(4), 121.025, and 121.190(1). *Response* at 7. However, the State has failed to meet its very heavy burden of demonstrating that its post-litigation statutory changes have mooted KRL's other claims; in fact, KRL's request for declaratory relief regarding these laws is very much alive. Also, its claims are ripe. Finally, the State errs in alleging that the Supreme Court has approved disclaimers on express advocacy, and that the State's contribution limits are constitutional.

I. THE STATE'S POST-LITIGATION CHANGES TO THE PROVISIONS AT ISSUE DO NOT MOOT KRL'S CLAIMS FOR DECLARATORY RELIEF REGARDING THEM.

The State maintains that its repeal and amendment of some of the challenged provisions moots KRL's claims regarding them. *Id.* at 18-27. However, because the State has stubbornly maintained that these provisions are constitutional, and the lower court has held them to be so, this Court should declare their former language unconstitutional to ensure the State does not change its mind again and reenact them.

Although claims for declaratory relief are often brought with claims for injunctive relief, there is, of course, a distinction between them. *Hoffman v. Hunt*, 845 F. Supp. 340, 351 (W.D.N.C. 1994). "Different considerations enter into a . . . court's decision as to declaratory relief on the one hand, and injunctive relief on the other." *Steffel v. Thompson*, 415 U.S. 452, 469 (1974). This distinction is important where mootness is at issue. A case is not necessarily moot if a defendant ceases its improper behavior

in response to a lawsuit but is free to return to it. *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994). Rather, defendants

> who voluntarily cease the . . . illegal conduct, bear the very heavy burden of demonstrating (1) with assurance that there is no reasonable expectation that the conduct will recur, *and* (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

Comer v. Cisneros, 37 F.3d 775, 800 (2nd Cir. 1994) (emphasis added).

Thus, while an amendment may moot the need for injunctive relief--for a court need not enjoin something that no longer exists-- there still may be a need for declaratory relief due to the possibility that unlawful laws may be reenacted. For example, in *City Of Mesquite v. Alladdin's Castle, Inc.*, 455 U.S. 283 (1982), the government repealed challenged language. In addressing mootness, the Court noted that

> [i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . In this case the city's repeal of the objectioinable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.

Id. at 289 (emphasis added).

Moreover, under circumstances similar to this case, federal courts have held that an (inherently) impermanent change in a law does not moot a challenge to it. In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.

1991), *cert. denied*, 112 S.Ct. 875, a district court upheld the original version of a law, which was later amended. The appellate court said that **even** if reenactment is not likely

> a case is not easily mooted where the [state] is otherwise unconstrained should it later decide to reenact the provision. . . . Not only could [it] reenact its earlier [law], but it could do so without the spectre of a prior finding of unconstitutionality. This factor weighs against mootness.

Id, at 927-928 (emphasis added).

In *Penny Saver Publications v. Village Of Hazel Crest*, 905 F.2d 150 (7th Cir. 1990), a newspaper challenged an ordinance which chilled speech. Although it was amended after the suit was filed, excluding the newspaper from its coverage, the lower court addressed the constitutionality of the original language and held it to be unconstitutional the state "acted on the advice of its counsel and amended the [challenged language]."). *Id.* at 153, n.1. The appellate court held that while the amendments mooted the request for injunctive relief,

> [t]his is **not** to say that [the] entire action is moot. Rather, [plaintiff] still has a viable claim for declaratory . . . relief. The fact that the ordinance has been amended subsequent to the commencement of this case does not moot [its] claims for either declaratory or monetary relief.

Id. at 153 (emphasis added) (citations and quotation marks omitted).

KRL's claims for declaratory relief are not mooted by changes to these laws. The State's "repeal of the

objectionable language would not preclude it from reenacting precisely the same" language if KRL's claims were dismissed. *City of Mesquite*, 455 U.S. at 289. Here, this is particularly likely given that the State has always insisted that these laws are constitutional; indeed, even *after* there were changed, i.e., during this appeal, it has maintained that these changes only confirm its view that the prior laws were lawful.[1] *Response* at 4-5. Moreover, given the lower court's ruling that this language is lawful, the State would be virtually 'unconstrained" in reenacting it; it could do so without the spectre of a prior finding of inconstitutionality." *Coral Construction*, 941 F.2d at 927-928. Thus, even though KRL's claims for injuctive relief may be moot, its claims for declaratory relief are not. *Penny Saver Publications*, 905 F.2d at 153. KRL has a "continuing interest" in adjudicating the constitutioinality of language which may be reenacted. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396-397 (1980). The State has failed to meet its "very heavy burden" of showing otherwise. *Cisneros*, 37 F.3d at 800.[2]

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[1] The changes to these laws only emphasize that the prior versions *were* overbroad and that KRL's interpretation *was* correct. For if they were not overbroad, why would there have been the need to amend them to exclude the very words which made them overbroad? Why would the State have needed to change laws which were constitutional? It is disingenuous for the State to say it changed them *precisely because they were lawful*.

[2] The State's argument that the prior version of KRS 121.035 (3) nullifies KRL's challenges to the prior versioins of KRS 121.025 and 121.035 (2) is misplaced for three reasons. First, KRS 121.035 (3) applied only to KRS 121.035, not to KRS 121.025. Second, KRS 121.035 (3) did not solve the problem with independent expenditures. Third, it applied only to "issues of public importance," which, by the State's own observation, *response* at 21, means only ballot measures, not all issue advocacy.

LEGISLATIVE RESEARCH COMMISSION
Frankfort, Kentucky 40601

John A. "Eck" Rose, Senate President
Jody Richards, House Speaker
Chairman
Don Cetrulo
Director

MEMORANDUM

TO: Amy Barkley
Aide to Rep. Anne Northup

FROM: Rob Williams, CSA
Elections and Constitutional Amendments

SUBJECT: Enacted Campaign Finance Legislation

DATE: May 31, 1996

You have asked me to provide you with a list of campaign finance bills enacted during the recent session and to indicate which ones were based on legislative recommendations of the Registry of Election Finance. That list follows along with the extent to which the final product mirrored the Registry's recommendations, if any.

HB 130: This bill is entirely a product of recommendations made by the Registry of Election Finance. The bill as introduced implemented a Registry recommendation regarding the deposit of campaign contribution by slates of candidates for Governor and Lieutenant Governor, but was amended in the Senate to add a number of provisions the Registry requested to address rulings made in lawsuits to which the Registry has been a party.

HB 132: This bill is entirely a product of Registry recommendations. As introduced the bill mandated the Registry to conduct random audits of campaign finance committees, but was amended to make the audit capacity permissive, to reflect the Registry's intent, rather than mandatory.

HB 133: This bill is entirely a product of the Registry's recommendation to clarify permissible political party contributions to slates of candidates for Governor and Lieutenant Governor.

HB 134: This bill is the product of a Registry recommendation to incorporate the provisions of a Registry administrative regulation regarding permissible in-kind contributions into the statutes. One change was made to the bill in the House to clarify language.

HB 59: This bill is the product of a Registry recommendation. It was enacted without changes.

HB 135: The Registry recommended that a mechanism be placed in the statutes to allow a candidate to "test the waters" by raising and spending money to determine whether to form a slate of candidates for Governor and Lieutenant Governor or to determine the composition of the slate. This would be done prior to actually filing nomination papers as a slate since the limitations of the public financing program, including acceptance of contributions, kick in only after a slate has filed nomination papers. Though the Registry made the recommendation that this mechanism be provided for, they did not come up with the language.

HB 207: This bill was not based on a recommendation of the Registry, but rather was requested by media advertising vendors. As the Registry had concerns about

implementation of the bill's provisions as introduced, the Registry worked out a compromise with the sponsor.

HB 695: This bill was not based on a recommendation of the Registry and they provided no input on it, either as it was introduced or amended and later enacted.

HB 744: This bill was not based on a recommendation of the Registry and they provided no input on it.

SB 55: This bill was not based on a recommendation of the Registry and they provided no input on it.

BROWN, TODD
& HEYBURN, PLLC

September 19, 1995

John K. Abegg
Bopp, Coleson & Bostrom
2 Foulkes Square
401 Ohio Street
P.O. Box 8100
Terre Haute, IN 47808-8100

Re: Kentucky Right to Life v.
Kentucky Registry of Election Finance, et al.

Dear Mr. Abegg:

Pursuant to your request, I enclose photocopies of Advisory Opinion 95-009 issued by the Kentucky Registry of Election Finance on May 7, 1995 and the Opinion of the Kentucky Attorney General, 75 OAG 546 issued on August 13, 1975. I am not familiar with any other formal opinions relating to the issues we have discussed recently.

Please note that KRS 121.135 (4) (a) specifically provides that an advisory opinion may be relied upon only by the person or committee to whom the advisory opinion is rendered. Accordingly, for your clients to obtain the safe harbor provided by KRS 121.135 (4) (b), you will need to prepare a request for an advisory opinion, setting forth the activity your client proposes to undertake, and an advisory opinion be issued to your client setting forth the Registry's enforcement position as to the proposed activity. We would work with you to expedite the issuance of an advisory opinion in response to your request in order to eliminate issues from our litigation.

Cordially,

/s/ Sheryl G. Snyder
Sheryl G. Snyder

Enclosures

cc: Rosemary Center